ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

No. 19-1066

SHAFER & FREEMAN LAKES ENVIRONMENTAL CONSERVATION CORPORATION, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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FINAL BRIEF: June 24, 2020

Certificate as to Parties, Rulings, and Related Cases

A. Parties

All parties and intervenors appearing before this Court are identified in the Brief of Petitioners.

B. Rulings

1. *N. Ind. Pub. Serv. Co.*, 163 FERC ¶ 61,212 (2018) (Initial Order), R.692, JA 969; and

2. *N. Ind. Pub. Serv. Co.*, 166 FERC ¶ 61,030 (2019) (Rehearing Order), R.718, JA 1021.

C. Related cases

This case has not previously been before this Court or any other court. To counsel's knowledge, there are no related cases pending before this Court or elsewhere.

/s/ Elizabeth E. Rylander
Elizabeth E. Rylander

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Glossary

Br.	Brief of Petitioners
Coalition	Petitioners Shafer & Freeman Lakes Conservation Corporation; Carroll County, Indiana; White County, Indiana; and the City of Monticello, Indiana
FERC or Commission	Respondent Federal Energy Regulatory Commission
Indiana	Indiana Department of Natural Resources
Initial Order	*N. Ind. Pub. Serv. Co.*, 163 FERC ¶ 61,212 (2018), R.692, JA 969
License Order	*N. Ind. Pub. Serv. Co.*, 121 FERC ¶ 62,009 (2007), JA 92
Licensee	Intervenor Northern Indiana Public Service Co.
NEPA	National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*
P	A paragraph in a FERC order
R.	An item in the record of this case
Rehearing Order	*N. Ind. Pub. Serv. Co.*, 166 FERC ¶ 61,030 (2019), R.718, JA 1021
Service	United States Fish and Wildlife Service

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Statement of Issues

Respondent Federal Energy Regulatory Commission (Commission or FERC) and Intervenor United States Fish and Wildlife Service (Service), each guided by its own statutory mandate, took different approaches to the issue of how to address unusually low river flow around the Norway-Oakland Hydroelectric Project (Project) on Indiana's Tippecanoe River. The Commission, which must balance a

range of developmental and environmental considerations in its hydroelectric licensing decisions under the Federal Power Act, preferred to address decreased water flow in the Tippecanoe River by pausing electric generation from one of the two Project dams, and maintaining the level of the Project reservoirs, which are regional recreation destinations. The Service, focused on wildlife conservation under the Endangered Species Act, would release reservoir water to ensure a minimum level of river flow over endangered freshwater mussels that live downstream of the Project.

Under these circumstances, the Commission deferred to the Service's expertise in the field of species protection. The Commission incorporated into the orders on review the Service's instruction that Intervenor Northern Indiana Public Service Company (Licensee) must prioritize downstream river flow over lake level maintenance when the water is low. *N. Ind. Pub. Serv. Co.*, 163 FERC ¶ 61,212 (2018) (Initial Order), R.692, JA 969; *on reh'g*, 166 FERC ¶ 61,030 (2019) (Rehearing Order), R.718, JA 1021.

Petitioners Shafer & Freeman Lakes Environmental Conservation Corporation; Carroll County, Indiana; White County, Indiana; and the

City of Monticello, Indiana (collectively, Coalition) – whose interests in recreation and economic development strongly depend on stable reservoir levels – contend that the Service's determination, made in a formal Biological Opinion, is based on flawed analysis. The Coalition claims that the Commission was wrong to rely on the Biological Opinion, and that the Commission could have (and should have) adopted its own low-water plans over the Service's.

Because the Commission did not develop the Biological Opinion, it is not in a position to address most of the Coalition's substantive challenges to the Biological Opinion. The Commission will defer to the Service, as intervenor, to respond to those challenges in its own brief.

So as to the Commission, the issue on review is:

Did the Commission reasonably defer to the Service's Endangered Species Act findings, and thus reasonably incorporate into the Project license the Service-recommended water-flow measures to protect endangered mussels?

Statutes and Regulations

Pertinent statutes and regulations are reproduced in the Addendum. A three-page chronological list of dates and events most relevant to this case is attached at the end of this brief.

Statement of Facts

I. Statutory and regulatory background

A. Federal Power Act

Part I of the Federal Power Act, 16 U.S.C. §§ 796-823, constitutes "a complete scheme of national regulation" to "promote the comprehensive development of the water resources of the Nation . . . ." *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 180 (1946). It provides a means of federal control over uses of the nation's water resources that the federal government has an interest in overseeing – including, "very prominently," generation of hydroelectricity. *FPC v. Union Elec. Co.*, 381 U.S. 90, 98 (1965). To this end, the Commission issues licenses for the construction, maintenance, and operation of project works necessary to generate power from waterways that fall under federal jurisdiction. 16 U.S.C. § 797(e). It is empowered to require applicants, as a condition of receiving a project license, to

modify their plans in order to ensure that those plans are consistent with a comprehensive plan for waterway uses. 16 U.S.C. § 803(a)(1)-(2); *see also Dep't of Interior v. FERC*, 952 F.2d 538, 543-44 (D.C. Cir. 1992) (license conditions may reflect environmental considerations).

B. National Environmental Policy Act

The Commission's consideration of an application for a hydroelectric license, and of significant license amendments, triggers environmental review. *See* 42 U.S.C. § 4332(2)(C). The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq*., sets out procedures for federal agencies to follow, to ensure that the environmental effects of proposed actions are "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 443, 350 (1989). "NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004) (citing *Robertson*, 490 U.S. at 349-50); *see also Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010) (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*,

534 U.S. 519, 538 (1978)) (NEPA ensures "'a fully informed and well-considered decision, not necessarily the best' decision"). An agency must "take a 'hard look' at the environmental consequences before taking a major action." *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (citation omitted).

Regulations implementing NEPA require agencies to consider the environmental effects of a proposed action by preparing either an environmental assessment, if supported by a finding of no significant impact, or a more comprehensive environmental impact statement. *See* 40 C.F.R. § 1501.4 (detailing when to prepare an environmental assessment versus an environmental impact statement). Once the agency issues a finding of no significant impact, it has fulfilled NEPA's documentation requirements. *See, e.g.*, *Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 857 (D.C. Cir. 2006) (citing 40 C.F.R. §§ 1501.4(e), 1508.9, 1508.13).

C. Endangered Species Act

The Endangered Species Act provides a statutory structure for protection of endangered and threatened species and the ecosystems on which those species depend. 16 U.S.C. § 1531(b). "The plain intent of

Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978).

Among other things, the Endangered Species Act prohibits the "take" of any endangered or threatened species of fish or wildlife, 16 U.S.C. § 1538, meaning action "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" that species. 16 U.S.C. § 1532(19). There is a limited exception to this rule for a "take" that is incidental to a federal agency action, and previously authorized in an incidental take statement. 16 U.S.C. § 1536(o)(2); *City of Tacoma v. FERC*, 460 F.3d 53, 75 (D.C. Cir. 2006).

The Endangered Species Act is jointly administered by the Fish and Wildlife Service and the National Marine Fisheries Service. 50 C.F.R. § 402.01(b). When contemplating any agency action, a federal agency that anticipates any effect of that action on an endangered species must consult one of those two wildlife agencies. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.01. The purpose of consultation is to ensure that the agency's own action, or any action that it authorizes, is "not likely to jeopardize the continued existence of any endangered or

threatened species," or result in the destruction or adverse modification of designated critical habitat for that species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.01(b); *City of Tacoma*, 460 F.3d at 75.

Informal interagency consultation is sufficient if the consulting agency (here, the Service) agrees in writing with the action agency (here, the Commission) that a proposed agency action is not likely to adversely affect endangered species or critical habitat. 50 C.F.R. § 402.13(a)-(c). But if the action agency anticipates that the action may affect endangered species or critical habitat, formal consultation is required. *Id.* § 402.14; *Ctr. for Biological Diversity v. Dep't of Interior*, 563 F.3d 466, 474-75 (D.C. Cir. 2009). The agencies must "use the best scientific and commercial data available" to fulfill their consultation requirements. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.14(d), (f).

If the consulting agency anticipates jeopardy to the listed species, or adverse modification of its habitat, it may suggest "reasonable and prudent alternatives" to the proposed agency action to avoid these prohibited results. 16 U.S.C. § 1536(b)(3)(A). The consulting agency then prepares a biological opinion and an incidental take statement specifying the "impact of such incidental taking on the species" and

"reasonable and prudent measures" that "must be complied with" in order to minimize such impact. *Id.* § 1536(b)(4).

II. Factual background

A. The Norway-Oakdale Project

The Project includes two hydroelectric dams and two long, narrow reservoirs. Initial Order PP 3-5, JA 970. Upstream, the Norway Dam impounds Lake Shafer, which is 10 miles long and 1,291 acres. *Id.* Downstream, the Oakdale Dam impounds Lake Freeman, which is 10 miles long and has a surface area of 1,547 acres. *Id.*

The dams went into service in 1923 and 1925, respectively. *N. Ind. Pub. Serv. Co.*, 121 FERC ¶ 62,009, at P 36 (2007), JA 102-03 (License Order). (The complex series of events and agency decisions giving rise to this appeal is summarized in the timeline appended to this brief.) For reasons not relevant here, the dams were not first licensed until 2007. *See id.* P 1, JA 92. By that time, Northern Indiana Public Service Company (Licensee) had sold about 2,000 acres of shoreline and the reservoir beds to Petitioner Shafer & Freeman Lakes Environmental Conservation Corporation. *Id.* P 37, JA 103. Consequently – and unusually for a Commission-jurisdictional project –

Licensee owns only 1 percent of the Project lands. *See id.* PP 36-37, JA 102-03. Shafer & Freeman Lakes Environmental Conservation Corporation owns about 85 percent, and the remaining 14 percent is in the hands of about 4,300 private property owners. *Id.*

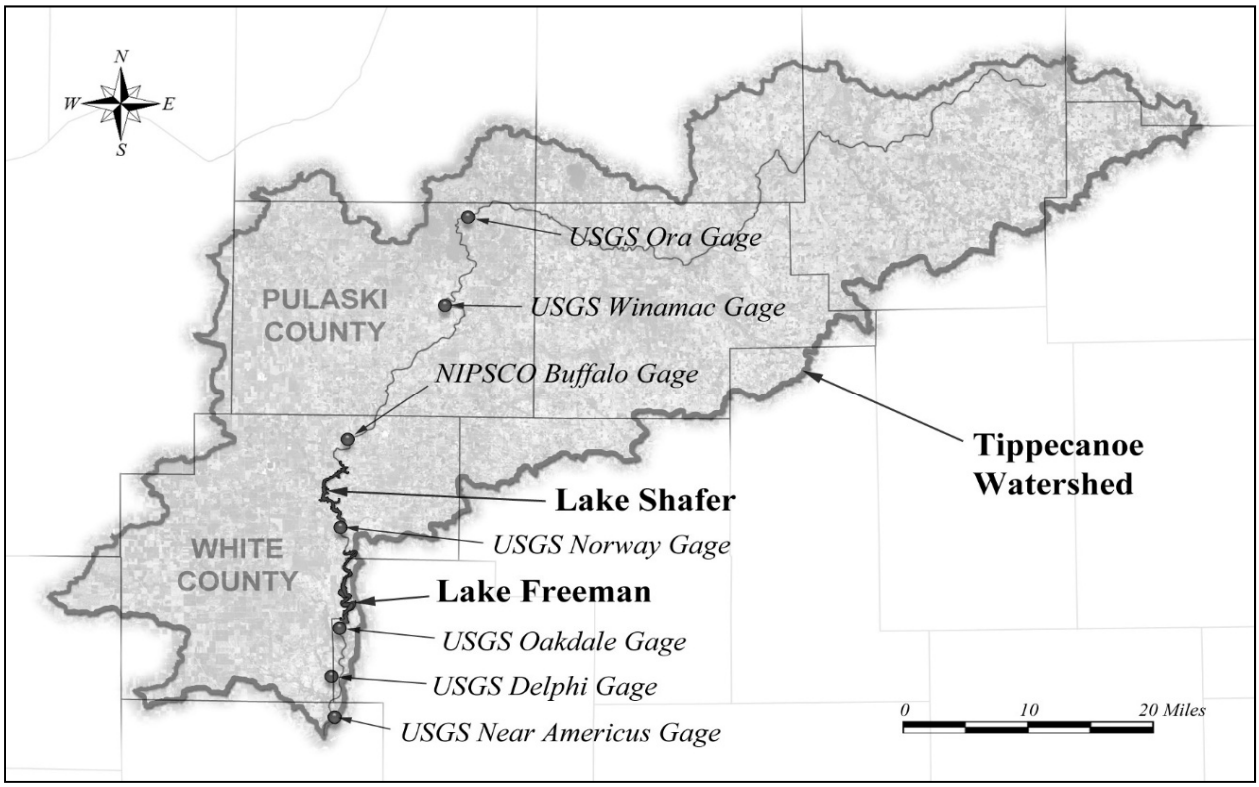
The Project area is "a regional recreation and tourist attraction," with both publicly- and privately-owned recreation facilities that allow for swimming, fishing, and boating. License Order P 43, JA 105; *see also id.* P 47, JA 106 (requiring Licensee to file a recreation management plan with the Commission). In 2005 Licensee estimated that there were 4,300 private lakefront properties in the Project area, and that "recreational activity in the project area was moderate to heavy." Final Environmental Assessment at 72-73, R.582, JA 741-42.

The Tippecanoe River "supports a diversity of mussels with 57 historical species and 48 extant species," including seven "that carry either state or federal special status and have exhibited declines in distribution" in recent years. License Order P 35, JA 102. In a 2003 survey of the Project vicinity, Licensee observed 36 species of freshwater mussels, including six federally-listed endangered species (the northern riffleshell, clubshell, rayed bean, sheepnose, snuffbox, and

fanshell), one federally-listed threatened species (the rabbitsfoot), and five additional species that the state of Indiana considers to be endangered or threatened. Final Environmental Assessment at 37, JA 706. Downstream of the Project, a "diverse community of other unlisted mussels" lives in the 18-mile reach between the Oakdale Dam and the confluence of the Tippecanoe and the Wabash Rivers. Letter from Scott Pruitt, Service, to Mike Finissi, Licensee, at 1, 2 (Aug. 13, 2014), JA 210, 211 (Technical Assistance Letter).

The Project license requires the Licensee to keep the lake levels stable. License Order at Ordering P (D), Article 403, JA 119 (Licensee "shall at all times act to minimize the fluctuation of the two reservoirs' surface elevations"). This is achieved by operating the reservoirs in "run of river" mode, which means that outflow from each dam should approximately equal the inflow to the reservoir behind that dam, and lake levels should vary no more than three inches above or below a target level. *Id.* As relevant here, river flow is measured in three locations: the United States Geological Service Winamac Gage, 45 miles upstream of the Oakdale Dam; the United States Geological Service Oakdale Gage, 0.25 miles downstream of the Oakdale Dam; and

the United States Geological Service Delphi Gage, 11 miles downstream of the Oakdale Dam. Initial Order PP 13, 15, 20, JA 972-73, 974-75. (The record occasionally refers to the United States Geological Service Ora Gage, which is 8 miles above the Winamac Gage, and to Licensee's Buffalo Gage, 12.5 miles upstream of Lake Shafer. *See* Final Environmental Assessment, R. 582 at 26, JA 695.) The gages' relative positions are shown in this map:



Id. at 4, JA 673.

The license allows for greater fluctuations in the reservoir water levels at times of "abnormal river conditions," which the license initially

defined as river flow of 3,000 cubic feet per second or more. License Order at Ordering P (B), Article 403, JA 119. Under Article 405 of the license, Licensee was required to develop a permanent definition of "abnormal river conditions" within five years. *Id.* Ordering P (B) Article 405, JA 121-22. In the same time frame, Licensee was also required to consult with Indiana and the Service to develop a plan to increase the population of native mussel species. *Id.* Ordering P (B), Article 411, JA 127-28.

B. The 2012 drought and the Service's Technical Assistance Letter

During the summer of 2012, northern Indiana experienced a severe drought that diminished water flow in the Tippecanoe River to the point where "sections of the river were essentially de-watered." Biological Opinion at 27, R.630, JA 893. Both the Service and the Indiana Department of Natural Resources (Indiana) observed that mussels died downstream of the Oakdale Dam, including members of the federally-listed sheepnose, clubshell, and fanshell species. Initial Order P 10, JA 972; Final Environmental Assessment at 63, JA 732. At that time, Licensee was consulting with both agencies on the mussel

enhancement plan that the license required. *See* Licensee's Request for Extension of Time (Sept. 7, 2012).

The Service recommended that Licensee release a minimum flow of 200 cubic feet per second from the Oakdale Dam in order to avoid take of the endangered mussels. Letter from Scott Pruitt, Service, to Mike Finissi, Licensee (July 10, 2012), JA 143; Initial Order P 10, JA 972. Following these instructions meant that more water flowed out of Lake Freeman than flowed into it, so Licensee briefly fell out of compliance with its FERC license. Initial Order P 10, JA 972. *See N. Ind. Pub. Serv. Co.*, 143 FERC ¶ 62,043, at P 10 (2013), JA 159-60 (noting that Lake Freeman fell 1.08 inches below its target level for 37 hours in July 2012). Licensee requested and received a temporary variance of Article 403, which permitted it to continue to release water as the Service required. *N. Ind. Pub. Serv. Co.*, 141 FERC ¶ 62,012, at P 11 (2012), JA 153 (approving variance through December 1, 2012).

In 2013 mussels continued to die in the river below the Oakdale Dam. Initial Order P 13, JA 972-73. The Service determined that year that a release of 200 cubic feet per second was no longer sufficient to avoid take of endangered mussels, and so it instructed Licensee to

increase and maintain a river flow of 500 cubic feet per second at the Delphi gage. *Id.* P 14, JA 973. Licensee estimated that it would need to discharge 450 cubic feet of water per second from the Oakdale Dam in order to satisfy this requirement, and it again requested a temporary variance of its license requirements. *Id.* During this time, Licensee continued to work with Indiana and the Service to develop a long-term approach to mussel protection. *See* Request for Temporary Variance of Article 403 at 1-2 (Dec. 10, 2013), JA 162-63.

In the summer of 2014, as Licensee continued its releases to comply with the Service's minimum flow requirements, it drew down Lake Freeman by 15 inches. Initial Order P 15, JA 973.

On August 13, 2014, the Service issued a Technical Assistance Letter to Licensee, describing dam operation measures that the Service expected Licensee to undertake in order to mimic natural run-of-river conditions. Technical Assistance Letter at 2, JA 211; Initial Order P 16, JA 973-74. The Service explained that the Norway and Oakdale Dams, "including various operational protocols and certain regulatory constraints on the dams," can affect downstream volume and flow of water. Technical Assistance Letter at 1, JA 210. Low water may

expose mussel habitat to vulnerable conditions, particularly when precipitation is also low. *Id.* Additionally, the rate of river flow can be much different upstream and downstream of the Oakdale Dam, with "swings in the amount of flow that are more frequent than the Service would expect under 'natural' conditions." *Id.* The Service wanted to avoid such large flow variations, because the mussels are "poorly adapted to this level of instability, especially during low to moderate flows." *Id.* at 2, JA 211.

The Service's Technical Assistance Letter defined an abnormal low-flow event as one in which the 24-hour daily average river flow is no more than 300 cubic feet per second at the Winamac gage, or no more than 600 cubic feet per second at the Oakdale gage. *Id.* at 4, JA 213. When an abnormal low-flow event occurs, Licensee must stop generating electricity from Oakdale Dam and release 1.9 times the amount of the previous 24-hour daily average flow as measured at the Winamac gage, or 500 cubic feet per second, whichever is less.

Technical Assistance Letter at 5-6, JA 214-15; Initial Order P 20, JA 974-75.

The Service explained that it selected the trigger flows and downstream flow requirements for abnormal low flows using linear scaling. Initial Order P 21, JA 975. Linear scaling assumes that river discharge increases predictably along with the size of the drainage basin. *Id.* Here, the drainage area at the Oakdale gage (downstream of the Project) is 1.9 times the size of the drainage area of the upstream Winamac gage. *Id.* The Service therefore assumes that natural flows at the Oakdale gage should be 1.9 times the flow at the Winamac gage. *Id.*

The Service expected the protocol outlined in the Technical Assistance Letter to "create conditions for [endangered] mussels sufficiently representative of natural run-of-river water flow so as to eliminate take of any [endangered] mussel . . . due to the Oakdale Dam." Technical Assistance Letter at 2, JA 211. It specified that, if Licensee acts in accordance with these protocols, the Service would

presume that dam operation has not caused take of endangered mussels downstream of Oakdale Dam. *Id.* at 9-10, JA 218-19.

The Commission, noting that the Technical Assistance Letter protocols could result in the drawdown of Lake Freeman, granted a variance of the hydroelectric license so that Licensee could comply with its license while releasing water in accordance with the Technical Assistance Letter. *N. Ind. Pub. Serv. Co.*, 148 FERC ¶ 62,156, at P 8 (2014), JA 228.

C. The license amendment proceeding

Following extensions of the compliance date specified in its license, in October 2014 Licensee proposed a new definition of "abnormal river flow," developed in consultation with Indiana and the Service. Licensee's proposed definition was essentially the same as the Service's definition in the Technical Assistance Letter: a 24-hour daily average river flow of 300 cubic feet per second or less at the Winamac gage, or 570 cubic feet per second or less at the Oakdale gage. Initial Order at P 23, JA 975-76. The new definition did not mention dam operation. *See id.* It did, however, specify an upper and a lower

elevation limit for Lake Shafer, and an upper limit – but no lower limit – for Lake Freeman. *Id.* PP 23-24, JA 975-76.

Months of agency process ensued, highlighting thematic (and ongoing) disagreements among the parties to this case. Indiana and the Service attributed mussel mortality largely to dam operation, while the Coalition blamed natural forces, such as limited precipitation. The Service would address low river conditions by managing the level of river flow; the Commission and the Coalition preferred to focus on the level of the reservoirs. For its part, Licensee preferred that the Commission and the Service reach a mutually acceptable resolution that would not leave Licensee "in the untenable position of choosing between inconsistent compliance requirements from two federal agencies." Licensee's Comments on Biological Opinion at 5 (Aug. 31, 2017), R.639, JA 928.

1. The Commission's Environmental Assessment, and the Staff Alternative

In their initial comments on Licensee's proposal, Indiana and the Service supported the license amendment as a reasonable way to eliminate Project-related take of endangered mussels. *See* Indiana Comments Regarding Abnormal Flow Conditions at 1 (Mar. 18, 2015),

R.222, JA 25 (noting that the "[m]inimum flow requirements that mimic a run-of-the-river flow are necessary to protect these imperiled species"); Interior Comments at 7 (Apr. 13, 2015), R.327, JA 36 (implementation of the recommended dam operating protocols "is expected to protect against any dam/reservoir related take" of endangered mussels below the Oakdale Dam). The Coalition opposed the new definition, denying that hydroelectric dams harm mussels, and disputing that linear scaling was the "best available science." Coalition Comments at 26-38 (May 15, 2015), R.415, JA 69-81.

After considering initial comments, Commission staff published a draft environmental assessment in accordance with NEPA. Draft Environmental Assessment (Oct. 9, 2015), R.466, JA 360. The draft assessment considered the environmental impacts of Licensee's proposal (which mirrored the Service's Technical Assistance Letter), a "no-action" alternative, and a Commission staff alternative. *Id.* at 9-75, JA 380-445.

Commission staff anticipated that Licensee's Technical Assistance Letter-based proposal would produce inaccuracies in measuring river flow into the Project using data from the Winamac Gage, 45 miles

upstream of Oakdale Dam. *Id.* at vi, 80, JA 369, 451. It also expected that allowing Licensee to draw down Lake Freeman to comply with the Service's river flow requirements would cause "frequent and substantial adverse effects on Lake Freeman." *Id.* Consequently, Commission staff, citing its Federal Power Act obligation to balance varied interests, recommended slight modifications to the proposal. *Id.* at 78, JA 449 ("We recommend this option because the staff alternative would provide reasonable protection of endangered mussels located downstream of Oakdale [D]am while also protecting the various environmental resources that depend on stable lake levels in Lake Freeman."). Most significantly, Commission staff recommended that, when low-flow conditions occur, Licensee stop generation at both dams and maintain the reservoir levels that prevailed at the time generation ceased. *Id.* at 79, JA 450. Under these circumstances, staff anticipated that the license amendment was not likely to adversely affect the mussels, and that there would be no significant environmental impact from the license amendment. *Id.* at 81, 83, JA 452, 454.

Staff asked the Service to concur under the Endangered Species Act that its alternative proposal likely would not adversely affect the

endangered mussels. Letter from Steve Hocking, FERC, to Scott Pruitt, Service (Oct. 9, 2015), R.468, JA 523. Some months later, Commission staff also held a technical conference, at which representatives of Indiana, the Service, and Shafer & Freeman Environmental Conservation Corporation participated, "to discuss the differences between the proposed action and the staff alternative as presented in the draft" environmental assessment. Final Environmental Assessment at 9, JA 678.

The Service did not concur in Commission staff's finding that the staff alternative was not likely to harm the downstream mussels. *See* Service Comments at 1-2 (Nov. 6, 2015), R.473, JA 528-29. In a later letter to the Commission, the Service explained that it was infeasible for Licensee "to maintain a static (or near static) lake level and release a comparatively consistent rate of flow downstream of Oakdale Dam." Service Comments at 2 (Oct. 17, 2016), R.574, JA 655 (citing Service Comments (June 7, 2016), R.532, JA 622). The Service urged the Commission not to issue a finding of no significant impact under NEPA. *Id.* at 5, JA 658.

In November 2016, Commission staff issued its final Environmental Assessment. Final Environmental Assessment, JA 659. Commission staff explained that its analysis showed that "several factors," primarily inaccuracies associated with estimating stream flows, were likely to impede effectiveness of the Service's Technical Assistance Letter protocols. *Id.* at vii, JA 667. Staff repeated its concern that historical records suggested the possibility that Lake Freeman could be drawn down significantly during low flow periods to satisfy the requirements of the Technical Assistance Letter, and that this would be detrimental to the environment around the lake. *Id.*

Staff again proposed revisions to Licensee's proposal, this time suggesting that in times of low flow, Licensee cease generation at the Oakdale development and release downstream flows in accordance with the Technical Assistance Letter, but not draw down the surface elevation of Lake Freeman (Staff Alternative). *Id.* at viii, JA 668. Staff noted that most stakeholders had asked the Commission to maintain current project operations under low-flow conditions, and that the Staff Alternative was consistent with those requests. *Id.* at ix, JA 669. It concluded that the Staff Alternative would eliminate the effect of

Project operations on endangered mussels, without creating new adverse environmental effects from drawdown of Lake Freeman. *Id.* at 89, JA 758. Contrary to the Service's wishes, staff made a Finding of No Significant Impact. *Id.*

2. The Service's Biological Opinion

Turning to its Endangered Species Act obligations, Commission staff requested the Service's concurrence with the Staff Alternative or, in the alternative, that the Service issue a biological opinion. Letter from Steve Hocking, FERC, to Scott Pruitt, Service (Nov. 10, 2016), R.583, JA 851. The Service did not concur that the Staff Alternative was not likely to adversely affect six endangered species of mussels in the Tippecanoe River. Service Comments at 1 (Dec. 9, 2016), R.589, JA 855. After a further exchange of information between the agencies, the Commission and the Service began formal consultation. Letter from Scott Pruitt, Service, to Steve Hocking, FERC, at 2 (Feb. 27, 2017), R.618, JA 865.

On July 5, 2017, the Service issued its Biological Opinion and an Incidental Take Statement based on its review of the Staff Alternative. Biological Opinion at 1, 49-50, JA 866, 915-16. The Service focused on

the potential, under the Staff Alternative, for low and varied river flow to adversely affect endangered mussels. *See id.* at 25-30, JA 891-96. It found positive change in that the revised definition of "abnormal river conditions" contemplated low flow. *Id.* at 41, JA 907. But the Staff Alternative otherwise did not go far enough: the Service stated that it "simply perpetuates actions in the current license requirements that have caused and will continue to cause take of mussels and negative effects to critical habitat." *Id.*

The Service posited that, for "instantaneous run-of-river to be a reality, 24-hour average inflows to and outflows from the Norway-Oakdale Complex should by the FERC's definition be identical." *Id.* at 25, JA 891. But those discharges "are rarely closely related even at a monthly scale," with discharge from the upstream Norway Dam often exceeding discharge from the downstream Oakdale Dam. *Id.* at 25-26, JA 891-92. In the late summer and early fall, when low flows "are not uncommon," the "effect of the FERC Staff Alternative is to amplify those conditions in the lower Tippecanoe River by releasing less water out of Oakdale Dam in order to maintain stable lake levels." *Id.* at 27, JA 893. The Service concluded that, at "the timescale and level of

change relevant to mussels, which can be hours to days and a few inches of water," the Staff Alternative would not produce natural river flows. *Id.*

The Service explained that the dams' exacerbation of low river flows "directly affects listed mussels" because they are vulnerable to death and reproductive disruptions from shallow water, and from being stranded above water. *Id.* at 41-42, JA 907-08. The Service also thought that, under the Staff Alternative, greater predation and human disruption of poorly submerged mussels were reasonably certain to occur, and it anticipated take of clubshell, fanshell, sheepnose, and rabbitsfoot mussels under these conditions. *Id.* at 42, 46, JA 908, 912.

The Service concluded that, while the Staff Alternative was not likely to jeopardize the continued existence of the clubshell, fanshell, sheepnose, and rabbitsfoot mussels, "[c]ontinued, regularly occurring take . . . could contribute to the extirpation of one or more species from the reach of the River." *Id.* at 48, JA 914. It therefore prescribed, as a reasonable and prudent measure, that the Commission require Licensee to implement the Technical Assistance Letter, which the Service "continues to support . . . as the best currently available approach to

mimic natural flow downstream of the Norway-Oakdale Complex." *Id.* at 50. It specified that the Commission must include this condition in any license amendment issued to Licensee, in order for the statutory exemption on incidental take to apply. *Id.* at 49, JA 915 (referring to 16 U.S.C. § 1536(o)(2)); *see also* Initial Order n.38, JA 982 (clarifying Commission's understanding of this instruction).

III. The Commission orders on review

In the orders on review, the Commission amended the Project license to incorporate Licensee's revised definition of "abnormal river conditions." Initial Order P 2 & Ordering P (B), JA 969, 995. The Commission accepted the Service's recommendations for protecting endangered mussels when the river is low. *Id.* PP 44-53, JA 982-86. It added the Service's incidental take statement and reasonable and prudent measures to the license, and thereby required Licensee to comply with the Technical Assistance Letter. *Id.* P 53, JA 985-86.

The Commission acknowledged "a difference of opinion" between itself and the Service as to how best to approximate run-of-river operations at the Oakdale development. Initial Order P 50, JA 984. The Service believed that supplementing low river flow with drawdown

from Lake Freeman would best approximate natural conditions for the mussels. *Id.* The Commission worried that "drawdowns would result in frequent and substantial adverse effects on other environmental resources associated with" the lake, such as difficulty accessing boating resources and noxious odors due to death and decay of plants and animals. *Id.* P 52, JA 985.

But the Commission emphasized that the Service's findings under the Endangered Species Act outweigh the Commission's own priorities under the Federal Power Act. *See* Initial Order P 53, JA 985-86 (Endangered Species Act constrains the Commission's discretion to implement the Staff Alternative); Rehearing Order P 28, JA 1028-29 (same). The Endangered Species Act "prohibits any taking of a listed species, except in compliance with an incidental take statement included in a biological opinion after a formal consultation." Initial Order P 53, JA 985-86. Consequently, the Commission routinely treats the reasonable and prudent measures recommended in the incidental take statement – here, compliance with the Technical Assistance Letter – as "mandatory conditions," and incorporates them into project licenses. *Id.* The agencies' "differing opinions do not provide us with

any basis for rejecting the biological opinion[.]" Rehearing Order P 28, JA 1028-29.

The Coalition contended that the Biological Opinion was flawed, and that the Commission should have adopted the Staff Alternative rather than rely on it. *See* Initial Order PP 60-62, JA 987-88; Rehearing Order PP 25-35, JA 1027-32. But the Commission found that it was "reasonable and appropriate" to rely on the Service's Biological Opinion, which "includes a thorough analysis of the likely effects of implementing the [Technical] Assistance Letter on the clubshell, fanshell, sheepnose, riffleshell, rayed bean, snuffbox, and rabbitsfoot mussels, and provides evidentiary support for the conditions and measures to be implemented." Initial Order P 69, JA 989-90. The Commission did not take up the substance of protestors' disagreements with the Biological Opinion, finding that those challenges asked the Commission "to review the validity of the biological opinion and substitute our judgment for that of" the Service. Rehearing Order P 32, JA 1031. Instead, the only means to raise such a challenge is on appeal. Initial Order P 67, JA 989 (citing *City of Tacoma*, 460 F.3d at 75); Rehearing Order P 33, JA 1031-32.

Summary of Argument

This case concerns, at bottom, a "difference of opinion" between the Commission and the Service that the Commission properly resolved in the Service's favor. Initial Order P 50, JA 984. All that is at issue with regard to the Commission's decision-making process is whether it reasonably relied on the Service's findings concerning the best way to manage water flow downstream of Oakdale Dam to protect endangered mussels. The Commission found that the Service had conducted a thorough analysis, and that the record supported reliance on the Service's opinion. Accordingly, the Commission approved a license amendment requiring that Licensee manage the Project dams in accordance with the Service's priorities and responsibilities under the Endangered Species Act.

The Coalition has provided no legal or factual reason to dissuade the Commission from its customary reliance on the Service's biological opinion, and it provides no basis for the Court to find that the Commission's reliance on the Service was arbitrary and capricious. First, the Commission is not required to review the substance of the Biological Opinion – although it did assure itself that the Service's

decision-making process was thorough and based on record evidence – absent new evidence that the Service did not consider. The Coalition has presented no such evidence. Second, the Coalition wrongly contends that the Service lacked authority to regulate the Project, because the endangered mussels allegedly died for reasons unrelated to the dams and reservoirs. The record supports the opposite conclusion, and the Commission was required to consult the Service once it perceived the potential for effects on endangered mussels. Third, the Coalition claims that the Service – by requiring Licensee to comply with the Technical Assistance Letter – improperly changed the scope of the Commission action under consideration. It provides no basis on which to overturn the Commission's finding that the change was minor within the meaning of applicable regulations.

Argument

I. Standard of review

Judicial review of the Commission's hydroelectric licensing decisions is deferential, and limited to determining whether those decisions are arbitrary and capricious. *See Duncan's Point Lot Owners Ass'n v. FERC*, 522 F.3d 371, 375 (D.C. Cir. 2008); 5 U.S.C. § 706(2)(A)

(reviewing court shall set aside agency actions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). Review under this standard is narrow. *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Id.* The court may not substitute its judgment for the Commission's, but must uphold the agency's decision if the agency has examined the relevant considerations and given a satisfactory explanation for its action, "including a rational connection between the facts found and the choice made." *Id.* at 782 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)). In the context of the Endangered Species Act, where the court is reviewing the Commission's reliance on a consulting agency's biological opinion, "the critical question" is whether FERC's decision to rely on the biological opinion was arbitrary and capricious. *City of Tacoma*, 460 F.3d at 75.

"The Commission's factual findings are conclusive if supported by substantial evidence." *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014) (citing 16 U.S.C. § 825*l*(b)). "Substantial evidence is

such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires more than a scintilla but less than a preponderance of evidence." *Id.* (internal quotations marks and citations omitted). When considering the Commission's "evaluation of scientific data within its technical expertise," the Court affords the Commission "an extreme degree of deference." *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015) (internal quotation marks and citations omitted); *see also Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989) ("Because analysis of the relevant documents requires a high level of technical expertise, we must defer to the informed judgment of the responsible federal agencies") (internal quotation marks omitted).

II. The Commission reasonably incorporated the Service's reasonable and prudent measure, to protect endangered mussels, into the Project license.

Throughout the agency proceedings, and again on appeal, the Coalition has advocated for a river management option that would not require (and indeed, would not allow) Licensee to draw down Lake Freeman in order to maintain river flow, and thus protect endangered mussels, below the dams. *See* Initial Order PP 61-62, JA 987-88;

Rehearing Order P 26, JA 1028. The Commission found persuasive the Coalition's arguments that lake drawdowns would have some negative consequences. *See* Final Environmental Assessment at 74, JA 743 (Licensee's proposal "would have substantial negative effects on recreational opportunities on Lake Freeman").

As the challenged orders explain, the Federal Power Act requires the Commission to consider and balance a wide variety of interests in its licensing decisions, including (among many other things) recreation and wildlife. Initial Order P 53, JA 985-86; Rehearing Order P 28, JA 1028-29; *see also* 16 U.S.C. § 803(a)(1) (requiring that hydroelectric projects be "best adapted to a comprehensive plan for improving or developing a waterway"). The Staff Alternative, and Commission staff's recommendation of that alternative, expressly acknowledges the balanced consideration that the Federal Power Act requires. *See* Draft Environmental Assessment at 78, JA 449; Final Environmental Assessment at 84, JA 753. It seeks to "eliminate flow fluctuations associated with project operations during periods of low flow," as the Service wanted, "while avoiding the adverse effects of drawdowns" as the Coalition and other stakeholders preferred. Final Environmental

Assessment at 17, JA 686; *see also* Technical Assistance Letter at 2-3, JA 211-12 (noting that stable river flow is necessary to avoid take of mussels during times of lower to moderate flow). If this were solely a Federal Power Act case, the Coalition would not be aggrieved.

But the Federal Power Act is not the end of the Commission's analysis of a license application; under the Endangered Species Act, it must seek the Service's opinion about the effects of its proposed action on wildlife. *See* 16 U.S.C. § 1536(a)(2); *Ctr. for Biological Diversity*, 563 F.3d at 474-75; Initial Order PP 37-41, JA 980-81. This interagency consultation process "reflects Congress's awareness that expert agencies (such as the [National Marine] Fisheries Service and the Fish and Wildlife Service) are far more knowledgeable than other federal agencies about the precise conditions that pose a threat to listed species." *City of Tacoma*, 460 F.3d at 75. The "expert agencies are in the best position to make discretionary factual determinations about whether a proposed agency action will create a problem for a listed species and what measures might be appropriate to protect the species." *Id.*

The statutory recognition of wildlife agency expertise "suggests Congress intended the action agency to defer, at least to some extent, to the determinations of the consultant agency." *Id.* (citing *Bennett v. Spear*, 520 U.S. 154, 169-70 (1997)). And because the wildlife agencies have authority to absolve action agencies and the parties they regulate from liability associated with incidental take of endangered species, the Service's biological opinions have "a powerful coercive effect on the action agency," to the point of being "virtually determinative." *Bennett*, 520 U.S. at 169, 170.

For these reasons, it is both reasonable and unsurprising that the Commission "routinely treats the reasonable and prudent measures in an incidental take statement, and the terms and conditions implementing those measures, as mandatory conditions and includes them in the license." Initial Order P 53, JA 985-86; Rehearing Order P 28, JA 1028-29; *accord*, *e.g.*, *Pub. Util. Dist. No. 2 of Grant Cnty.*, 123 FERC ¶ 61,049, at PP 55-63 (2008) (adopting license conditions from both the Fish and Wildlife Service and the Fisheries Service); *PacifiCorp*, 105 FERC ¶ 61,237, at P 63 (2003) (adopting license conditions from the Fish and Wildlife Service).

Accordingly, the Court's review focuses on "whether the action agency's *reliance* was arbitrary and capricious, not whether the [biological opinion] itself is somehow flawed." *City of Tacoma*, 460 F.3d at 75; *accord Dow AgroSciences v. NMFS*, 637 F.3d 259, 266-67 (4th Cir. 2011). As a general matter, this and other courts have found it reasonable for an action agency to defer to the opinion of the expert wildlife agency. *See Bennett*, 520 U.S. at 169-70 (action agency disregards a jeopardy finding in a Biological Opinion "at its own peril"); *City of Tacoma*, 460 F.3d at 75 (citing *Bennett*, 520 U.S. at 169-70); *Me. Council of Atl. Salmon Fed'n v. FERC*, 741 Fed. App'x 807 (D.C. Cir. 2018) (unpublished) (Commission's reliance on expert agency's Biological Opinion was "not arbitrary or capricious").

III. The Coalition's objections are unavailing.

The Coalition argues that the Commission's reliance on the Biological Opinion was wrong, because: (1) natural conditions were responsible for endangered mussel mortality, so the Service could not require that the Project supplement low river flow (Br. 19, 23-25); (2) the Service's reasonable and prudent measures impermissibly changed the Staff Alternative (*id.* at 19, 25-27); and (3) the Biological Opinion is

invalid because it relies on linear scaling (*id.* at 20, 27-29). But the Coalition has provided no basis for the Commission to review the substance of the Service's findings, or to reject the Service's conclusions.

A. The Commission is not responsible for reviewing the substance of the Biological Opinion.

The Coalition argues that the Commission's reliance on the Biological Opinion was arbitrary and capricious because the Service's hydrological analysis (i.e., its use of linear scaling) was flawed, and because other record evidence contradicted it. Br. 28-29. This argument suggests that the Commission should have independently reviewed the Service's Biological Opinion to assure its accuracy and persuasiveness before adopting it.

The Commission must provide the Service with "the best scientific and commercial data available" for formal consultation, and the Service also must use the best available data when developing its biological opinion. Rehearing Order P 31, JA 1030-31 (citing 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d)); 50 C.F.R § 402.14(g)(8). The Commission fulfilled its duty by submitting its own hydrological studies, which disagreed somewhat with the Technical Assistance Letter's use of linear scaling. *See* Final Environmental Assessment at

B-38 to B-39, JA 818-19. From there it was the Service's responsibility to decide what constitutes the best available science for purposes of its biological opinion. *See Miccosukee Tribe of Indians v. United States*, 566 F.3d 1257, 1265 (11th Cir. 2009) (citing *Marsh*, 490 U.S. at 377-78).

That the Service drew a different conclusion than the Commission did is not a fatal error, but rather "a difference of opinion." Initial Order P 50, JA 984. Indeed, because the two agencies have different statutory obligations, the Commission "would not necessarily expect" the Service to reach the same conclusions that the Commission did. Rehearing Order P 28, JA 1028-29. The Biological Opinion thoroughly analyzes "the likely effects of implementing the [Technical] Assistance Letter on the clubshell, fanshell, sheepnose, riffleshell, rayed bean, snuffbox, and rabbitsfoot mussels, and provides evidentiary support for the conditions and measures to be implemented," so the Commission deemed it appropriate to rely on it. Initial Order P 69, JA 989-90. *Cf. City of Tacoma*, 460 F.3d at 75 (reliance on a facially flawed Biological Opinion likely would be arbitrary and capricious).

This reliance does not amount to "blindly adopt[ing] the conclusions of the consultant agency," based only on that agency's

expertise. *City of Tacoma*, 460 F.3d at 76. The only circumstance that could, possibly, justify a new analysis of a "no-jeopardy" opinion from a consulting agency is if there is new information that the agency did not consider. *Id.* at 76 (quoting *Pyramid Lake Paiute Tribe of Indians v. Dep't of Navy*, 898 F.3d 1410, 1415 (9th Cir. 1990)); *see also Aluminum Co. of Am. v. Bonneville Power Admin.*, 175 F.3d 1156, 1161 (9th Cir. 1999); *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1460 (9th Cir. 1984). Absent that, the Commission may rely on a Biological Opinion that is based on even "admittedly weak" evidence. *City of Tacoma*, 460 F.3d at 76 (quoting *Pyramid Lake*, 898 F.3d at 1415). As the Commission noted in the orders, there is substantial risk to doing otherwise. Initial Order P 53, JA 985-86 (quoting *Bennett*, 520 U.S. at 169, for the proposition that an action agency disregards a biological opinion at its own peril); *see also* Biological Opinion at 49, JA 915 (implementation of reasonable and prudent measure is "non-discretionary, and must be undertaken by the FERC" in order for the protection of the incidental take statement to apply).

The Coalition provided no new evidence here. *See* Initial Order P 63, JA 988 (no demonstration that Biological Opinion was

unsupported). Its own citations show that the hydrological studies it prefers were available to the Service well before that agency issued the Biological Opinion in November 2017. *See* Br. 29 (citing Expert Report of Robert E. Criss, Ph.D. (May 15, 2015), R.417, JA 230; Expert Report of Bernard Engel, Ph.D. (May 15, 2015), R.418, JA 263; Response to Data Request of Indiana Lt. Governor (Feb. 16, 2016), R. 512, JA 560; Final Environmental Assessment, Appendix B (Nov. 10, 2016), JA 774-826); *see also* Service Comments at 2, 5 (Oct. 17, 2016), JA 655, 658 (at technical conference, "rather than working cooperatively to make a science-based determination with respect to linear scaling . . . [Shafer & Freeman Lakes Environmental Conservation Corporation] . . . has tried to focus attention back on the status quo maintenance of the lake level," but "has presented no new information" to support its position). Noting the lack of new information, the Commission appropriately concluded that it could (and should) rely on the Service's opinion rather than conduct a new analysis. Initial Order P 67, 69-70, JA 989, 989-90; *see also* Rehearing Order P 32, JA 1031 (declining to "substitute our judgment" for the Service's).

Even if the Coalition's evidence had been new, merely producing an expert opinion different than the Service's does not conclusively demonstrate that the Service did not use best available science, or that the Commission should not have relied on its opinion. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 783-84 (where Commission "seriously and carefully" addressed competing, cogent arguments for a certain rate structure, "it is not our job to render that judgment, on which reasonable minds can differ"); *Ala. Power Co. v. FERC*, 979 F.2d 1561, 1565 (D.C. Cir. 1992) (rejecting licensee's suggestion, via expert testimony, to require further study of effects of pre-existing river flow regime on snails). Even outside the context of the Endangered Species Act, federal agencies can be expected to rely on the views of other agencies with greater expertise or responsibility as to particular issues. *See City of Boston Delegation v. FERC*, 897 F.3d 241, 255 (D.C. Cir. 2017) (approving FERC's reliance on Nuclear Regulatory Commission findings as to safety of natural gas pipeline near NRC-licensed nuclear plant).

The Coalition's remaining arguments – that the Service purposefully excluded from its analysis data that did not support its

conclusions, and used an incorrect exponent value in its chosen formula (Br. 20, 28) – attack the substance of the Service's analysis, so the Commission will not respond to them. (The Service, as an intervenor in support of respondent Commission, will file its own brief justifying its own findings and conclusions.) But the Court cannot consider the arguments in any event, because the Coalition did not raise them in its request for rehearing of the Initial Order. *See* 16 U.S.C. § 825*l*(b); *Me. Council*, 741 Fed. App'x at 807-08 (explaining that court precedent forecloses defense that "reasonable ground" exception applies).

B. The record before the Commission does not support the factual findings the Coalition prefers.

The Coalition next claims that the Commission should not have deferred to the Service because the Service cannot require that the Project supplement low river flow – first, because natural conditions, not dam operations, were causing mussel mortality; second, because this requirement works an impermissible change to the Staff Alternative. The Service and the Commission have already considered these arguments, and it "does not suffice, when urging an action agency to reject the [Biological Opinion] of a consultant agency, simply to

reargue factual issues the consultant agency already took into consideration." *City of Tacoma*, 460 F.3d at 76.

First, the Coalition argues that the Service found it possible for natural conditions to cause mussel mortality that is not "take" for purposes of the Endangered Species Act. Br. 19, 24 (citing Technical Assistance Letter at 4, JA 213; Licensee's Response to January 30, 2014 Additional Information Request, Att. C (Apr. 30, 2014), JA 193). True as that may be, it is irrelevant. The record before the Commission – including the very statements the Coalition cites, and other evidence it submitted – reflects the understanding of the Service and other parties that the dams cause additional take, and the thrust of the Service's analysis was to eliminate that additional take. *See* Technical Assistance Letter at 2, 4, JA 211, 213 (Service protocols are intended to reduce take to the levels "expected if the dams and reservoirs were not in place"); Licensee's Response to Additional Information Request at 19 (Apr. 30, 2014), JA 193 (without the dams in place, low flows during drought conditions would cause mussels to die, but the dams further reduce river flow below the dams, further endangering mussels); Indiana, *Nongame Aquatic Biologist Monthly Report* at 1 (July 2012),

R.416 at 77, JA 145 (dry riverbed and "large amounts" of exposed live mussels were the result of both extreme drought conditions and Licensee attempting to maintain the level of Lake Freeman per its hydroelectric license). *See also* Biological Opinion at 17, JA 883 (Project dams and reservoirs have affected mussels and their habitat since the 1920s). As detailed above in Argument Section II, the Commission properly consulted with the Service about the license amendment's effect on endangered mussels, and correctly deferred to the Service's determination that it was appropriate to provide supplemental water flow below Oakdale Dam as necessary to protect the mussels that live there. *See supra* pp. 33-37.

Second, the Coalition asserts that because the Biological Opinion eliminated the lower reservoir elevation limit for Lake Freeman, it impermissibly changed the Staff Alternative. Br. 25-27, 44. "Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the [agency] action and may involve only minor changes." 50 C.F.R. § 402.14(i)(2). A reviewing court considers whether reasonable and prudent measures are minor or major changes

to the proposed agency action. *Westlands Water Dist. v. Dep't of Interior*, 376 F.3d 853, 876 (9th Cir. 2004).

The Commission found that the reasonable and prudent measure here "would not change the action's basic design, location, scope, duration, and timing," Initial Order P 66, JA 989, and was not a major change. Rehearing Order P 35, JA 1032. In making this finding, the Commission also considered the agencies' goal of protecting the mussels. While the Service's "reasonable and prudent measure would result in lower reservoir levels during periods of low flow, this approach is designed to achieve the same purpose as the Commission staff alternative, to approximate run-of-river flow and protect downstream mussels." Rehearing Order PP 34-35, JA 1032; Initial Order P 66, JA 989 (same); *see also Westlands*, 376 F.3d at 876 (court would "'not upset an agency's assessment of its obligations under [16 U.S.C. § 1536] unless that assessment is arbitrary and capricious'") (quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336 (9th Cir. 1992)). The Coalition provides no basis on which to overturn this finding.

Conclusion

For the foregoing reasons, the Court should deny the petition for review.

Respectfully submitted,

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FINAL BRIEF: June 24, 2020

Certificate of Compliance

In accordance with Fed. R. App. P. 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,561 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Century Schoolbook 14-point font, in Microsoft Word for Office 365.

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ADDENDUM
Statutes & Regulations

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§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(b).	June 11, 1946, ch. 324, § 10(b), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, § 10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, § 10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, § 10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof,

1978—Subsec. (c). Pub. L. 95–632 designated existing provision as par. (1), and in par. (1) as so designated, redesignated pars. (1) to (5) as subpars. (A) to (E), respectively, and subpars. (A) and (B) of subpar. (E), as so redesignated, as cls. (i) and (ii), respectively, substituted ''paragraph'' for ''subsection'' in provision preceding subpar. (A), as so redesignated, ''endangered or threatened species of fish or wildlife'' for ''endangered species or threatened species'' in subpar. (D), as so redesignated, ''subparagraphs (C), (D), and (E) of this paragraph'' for ''paragraphs (3), (4), and (5) of this subsection'' in cl. (i) of subpar. (E), as so redesignated, ''clause (i) and this clause'' for ''subparagraph (A) and this subparagraph'' in cl. (ii) of subpar. (E), as so redesignated, and added par. (2).

1977—Subsec. (c). Pub. L. 95–212, §1(1), inserted provisions that States in which the State fish and wildlife agencies do not possess the broad authority to conserve all resident species of fish and wildlife which the Secretary determines to be threatened or endangered may nevertheless qualify for cooperative agreement funds if they satisfy all other requirements and have plans to devote immediate attention to those species most urgently in need of conservation programs.

Subsec. (i). Pub. L. 95–212, §1(2), substituted provisions authorizing appropriations of $10,000,000 to cover the period ending Sept. 30, 1977, and $16,000,000 to cover the period beginning Oct. 1, 1977, and ending Sept. 30, 1981, for provisions authorizing appropriations of not to exceed $10,000,000 through the fiscal year ending June 30, 1977.

COOPERATIVE AGREEMENTS WITH STATES UNAFFECTED BY 1981 AMENDMENT OF MARINE MAMMAL PROTECTION ACT

Nothing in the amendment of section 1379 of this title by section 4(a) of Pub. L. 97–58 to be construed as affecting in any manner any cooperative agreement entered into by a State under subsec. (c) of this section before, on, or after Oct. 9, 1981, see section 4(b) of Pub. L. 97–58, set out as a note under section 1379 of this title.

§ 1536. Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an ''agency action'') is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a), the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3), and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2), and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2), the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological assessment

(1) To facilitate compliance with the requirements of subsection (a)(2), each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

(e) Endangered Species Committee

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the ''Committee'').

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

(4)(A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Gov-

ernment service are allowed expenses under section 5703 of title 5.

(5)(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7)(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act [5 U.S.C. 552a], the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) Promulgation of regulations; form and contents of exemption application

Not later than 90 days after November 10, 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include, but not be limited to—

(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a)(2) of this section.

(g) Application for exemption; report to Committee

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2), the Secretary's opinion under subsection (b) indicates that the agency action would violate subsection (a)(2). An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the ''exemption applicant'' in this section.

(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f), not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term ''final agency action'' means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary—

(A) determine that the Federal agency concerned and the exemption applicant have—

(i) carried out the consultation responsibilities described in subsection (a) in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2);

(ii) conducted any biological assessment required by subsection (c); and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d); or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A)(i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b)(1) and (2) thereof) of title 5 and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing—

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d).

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of title 5.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) Grant of exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5). The Committee shall grant an exemption from the requirements of subsection (a)(2) for an agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4) and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d); and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action—

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless—

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) or was not identified in any biological assessment conducted under subsection (c), and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with re-

spect to the matter within 30 days after the date of the finding.

(i) Review by Secretary of State; violation of international treaty or other international obligation of United States

Notwithstanding any other provision of this chapter, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Exemption for national security reasons

Notwithstanding any other provision of this chapter, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) Exemption decision not considered major Federal action; environmental impact statement

An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.]: *Provided*, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(*l*) Committee order granting exemption; cost of mitigation and enhancement measures; report by applicant to Council on Environmental Quality

(1) If the Committee determines under subsection (h) that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such a report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

(m) Notice requirement for citizen suits not applicable

The 60-day notice requirement of section 1540(g) of this title shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) Judicial review

Any person, as defined by section 1532(13) of this title, may obtain judicial review, under chapter 7 of title 5, of any decision of the Endangered Species Committee under subsection (h) in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(*o*) Exemption as providing exception on taking of endangered species

Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title, sections 1371 and 1372 of this title, or any regulation promulgated to implement any such section—

(1) any action for which an exemption is granted under subsection (h) shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) shall not be considered to be a prohibited taking of the species concerned.

(p) Exemptions in Presidentially declared disaster areas

In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.], the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act [42 U.S.C.

5171 or 5172], and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

(Pub. L. 93–205, § 7, Dec. 28, 1973, 87 Stat. 892; Pub. L. 95–632, § 3, Nov. 10, 1978, 92 Stat. 3752; Pub. L. 96–159, § 4, Dec. 28, 1979, 93 Stat. 1226; Pub. L. 97–304, §§ 4(a), 8(b), Oct. 13, 1982, 96 Stat. 1417, 1426; Pub. L. 99–659, title IV, § 411(b), (c), Nov. 14, 1986, 100 Stat. 3741, 3742; Pub. L. 100–707, title I, § 109(g), Nov. 23, 1988, 102 Stat. 4709.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a)(1), (i), and (j), was in the original ''this Act'', meaning Pub. L. 93–205, Dec. 28, 1973, 81 Stat. 884, known as the Endangered Species Act of 1973, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 1531 of this title and Tables.

The Privacy Act, referred to in subsec. (e)(7)(C), is probably a reference to section 552a of Title 5, Government Organization and Employees. See Short Title note set out under section 552a of Title 5.

The National Environmental Policy Act of 1969, referred to in subsec. (k), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

The Disaster Relief and Emergency Assistance Act, referred to in subsec. (p), is Pub. L. 93–288, May 22, 1974, 88 Stat. 143, as amended, known as the Robert T. Stafford Disaster Relief and Emergency Assistance Act, which is classified principally to chapter 68 (§ 5121 et seq.) of Title 42. For complete classification of this Act to the Code, see Short Title note set out under section 5121 of Title 42 and Tables.

AMENDMENTS

1988—Subsec. (p). Pub. L. 100–707 substituted ''the Disaster Relief and Emergency Assistance Act'' for ''the Disaster Relief Act of 1974'' and ''section 405 or 406 of the Disaster Relief and Emergency Assistance Act'' for ''section 401 or 402 of the Disaster Relief Act of 1974''.

1986—Subsec. (b)(4)(C). Pub. L. 99–659, § 411(b)(1)–(3), added subpar. (C).

Subsec. (b)(4)(iii), (iv). Pub. L. 99–659, § 411(b)(4)–(6), added cl. (iii), redesignated former cl. (iii) as (iv), and in cl. (iv), as so redesignated, inserted reference to cl. (iii).

Subsec. (*o*). Pub. L. 99–659, § 411(c)(1), in introductory provisions, inserted '', sections 1371 and 1372 of this title,'', and substituted ''any'' for ''either'' after ''implement''.

Subsec. (*o*)(2). Pub. L. 99–659, § 411(c)(2), substituted ''subsection (b)(4)(iv)'' for ''subsection (b)(4)(iii)'' and inserted ''prohibited'' before ''taking of the species''.

1982—Subsec. (a)(3), (4). Pub. L. 97–304, § 4(a)(1), added par. (3) and redesignated former par. (3) as (4).

Subsec. (b). Pub. L. 97–304, § 4(a)(2), incorporated existing provisions into pars. (1)(A) and (3)(A) and added pars. (1)(B), (2), (3)(B), and (4).

Subsec. (c)(1). Pub. L. 97–304, § 4(a)(3), inserted '', except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor'' after ''agency'' in parenthetical provision.

Subsec. (e)(10). Pub. L. 97–304, § 4(a)(4), struck out provision that, except in the case of a member designated pursuant to paragraph (3)(G) of this subsection, no member could designate any person to serve as his or her representative unless that person was, at the time of such designation, holding a Federal office the appointment to which was subject to the advice and consent of the United States Senate.

Subsec. (g)(1). Pub. L. 97–304, § 4(a)(5)(B), substituted ''An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) after a report is made pursuant to paragraph (5)'' for ''An application for an exemption shall be considered initially by a review board in the manner provided in this subsection, and shall be considered by the Endangered Species Committee for a final determination under subsection (h) after a report is made by the review board''.

Subsec. (g)(2)(A). Pub. L. 97–304, § 4(a)(5)(C)(i), substituted ''An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f), not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license'' for ''An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f) of this section, not later than 90 days after the completion of the consultation process; or, in the case of any agency action involving a permit or license applicant, not later than 90 days after the date on which the Federal agency concerned takes final agency action, for purposes of chapter 7 of title 5, with respect to the issuance of the permit or license'' and inserted provision that, ''For purposes of the preceding sentence, the term 'final agency action' means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review.''

Subsec. (g)(2)(B). Pub. L. 97–304, § 4(a)(5)(C)(ii), inserted ''(i)'' after ''the Secretary shall promptly'', struck out ''to the review board to be established under paragraph (3) and'' after ''individuals to be appointed'' in cl. (i) as so designated, and added cl. (ii).

Subsec. (g)(3). Pub. L. 97–304, § 4(a)(5)(D), (E), redesignated par. (5) as (3) and substituted provisions directing the Secretary, within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, to (A) determine that the Federal agency concerned and the exemption applicant have (i) carried out the consultation responsibilities described in subsection (a) of this section in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2) of this section, (ii) conducted any biological assessment required by subsection (c) of this section, and (iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section, or (B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii), and providing that the denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5, for provisions placing upon the review board appointed under former par. (3) the duty to make a full review of the consultation carried out under subsection (a)(2) of this section, and within 60 days after its appointment or within such

longer time as was mutually agreed upon between the exemption applicant and the Secretary, to make a determination, by a majority vote, (A) whether an irresolvable conflict existed and (B) whether the Federal agency concerned and such exemption applicant had (i) carried out its consultation responsibilities as described in subsection (a) of this section in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2) of this section, (ii) conducted any biological assessment required of it by subsection (c) of this section, and (iii) refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section, and providing that any determination by the review board that an irresolvable conflict did not exist or that the Federal agency concerned or the exemption applicant had not met its respective requirements under subclause (i), (ii), or (iii) was to be considered final agency action for purposes of chapter 7 of title 5. Former par. (3), providing for the establishment and functions of a review board to consider applications for exemptions and to submit reports to the Endangered Species Committee, was struck out.

Subsec. (g)(4). Pub. L. 97–304, §4(a)(5)(D), (F), redesignated par. (6) as (4) and substituted ''If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A)(i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b)(1) and (2) thereof) of title 5 and prepare the report to be submitted pursuant to paragraph (5)'' for ''If the review board determines that an irresolvable conflict exists and makes positive determinations under subclauses (i), (ii), and (iii) of paragraph (5), it shall proceed to prepare the report to be submitted under paragraph (7)''. Former par. (4), directing the Secretary to submit the application to the review board immediately after its appointment under paragraph (3), and to submit to the review board, in writing, his views and recommendations with respect to the application within 60 days after receiving a copy of any application under paragraph (2), was struck out.

Subsec. (g)(5). Pub. L. 97–304, §4(a)(5)(G), redesignated par. (7) as (5) and substituted ''Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit'' for ''Within 180 days after making the determinations under paragraph (6), the review board shall submit'' in the provisions preceding subpar. (A), and added subpar. (D). Former par. (5) redesignated (3) and amended.

Subsec. (g)(6). Pub. L. 97–304, §4(a)(5)(H), redesignated par. (8) as (6). Former par. (6) redesignated (4) and amended.

Subsec. (g)(7). Pub. L. 97–304, §4(a)(5)(I), redesignated par. (10) as (7) and substituted ''Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section'' for ''Upon request of a review board, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the review board to assist it in carry out its duties under this section''. Former par. (7) redesignated (5) and amended.

Subsec. (g)(8). Pub. L. 97–304, §4(a)(5)(J), redesignated par. (12) as (8) and substituted ''records resulting from activities pursuant to this subsection'' for ''records of review boards''. Former par. (8) redesignated (6).

Subsec. (g)(9). Pub. L. 97–304, §4(a)(5)(D), struck out par. (9) which had provided that the review board, in carrying out its duties, could (A) sit and act at such times and places, take such testimony, and receive such evidence, as the review board deemed advisable, (B) subject to the Privacy Act of 1974 [5 U.S.C. 552a], request of any Federal agency or applicant information necessary to enable it to carry out such duties, and upon such request the head of such Federal agency would furnish such information to the review board, and (C) use the United States mails in the same manner and upon the same conditions as a Federal agency.

Subsec. (g)(10). Pub. L. 97–304, §4(a)(5)(I), redesignated par. (10) as (7).

Subsec. (g)(11). Pub. L. 97–304, §4(a)(5)(D), struck out par. (11) which had provided that the Administrator of the General Services Administration provide to a review board, on a reimbursable basis, such administrative support services as the review board requested.

Subsec. (g)(12). Pub. L. 97–304, §4(a)(5)(J), redesignated par. (12) as (8).

Subsec. (h)(1). Pub. L. 97–304, §4(a)(6), substituted ''within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5)'' for ''within 90 days of receiving the report of the review board under subsection (g)(7)'' in provisions preceding subpar. (A), substituted ''report of the Secretary, the record of the hearing held under subsection (g)(4) and on such other testimony'' for ''report of the review board and on such other testimony'' in subpar. (A) preceding cl. (i), and added cl. (iv).

Subsec. (*o*). Pub. L. 97–304, §4(a)(7), substituted ''Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title or any regulation promulgated to implement either such section (1) any action for which an exemption is granted under subsection (h) shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and (2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iii) shall not be considered to be a taking of the species concerned'' for ''Notwithstanding sections 1533(d) and 1538(a) of this title or any regulations promulgated pursuant to such sections, any action for which an exemption is granted under subsection (h) of this section shall not be considered a taking of any endangered or threatened species with respect to any activity which is necessary to carry out such action''.

Subsec. (q). Pub. L. 97–304, §8(b), struck out subsec. (q) which authorized appropriations of $600,000 for each of fiscal years 1979, 1980, 1981, and 1982 in carrying out functions under subsecs. (e), (f), (g), and (h) of this section. See section 1542(c) of this title.

1979—Subsec. (a). Pub. L. 96–159, §4(1), designated existing provisions as par. (1); struck out third sentence requirement that each Federal agency, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (referred to as ''agency action'') did not jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which was determined by the Secretary, after consultation as appropriate with the affected States, to be critical, unless the agency was granted an exemption for such action by the Committee pursuant to subsec. (h) of this section; and added pars. (2) and (3), incorporating former third sentence provisions.

Subsec. (b). Pub. L. 96–159, §4(2), (3), substituted ''he believes would not violate subsection (a)(2) of this section and'' for ''he believes would avoid jeopardizing the continued existence of any endangered or threatened species or adversely modifying the critical habitat of such species, and which'' before ''can be taken'' and introductory ''subsection (a)(2) of this section'' for ''subsection (a) of this section''.

Subsec. (c). Pub. L. 96–159, §4(3), (4), substituted ''subsection (a)(2)'' for ''subsec. (a)'' of this section, designated existing provisions as so amended par. (1), and added par. (2).

Subsec. (d). Pub. L. 96–159, §4(3), (5), substituted introductory words ''subsection (a)(2)'' for ''subsection (a)'' of this section and ''alternative measures which would not violate subsection (a)(2)'' for ''alternative measures which would avoid jeopardizing the continued

existence of any endangered or threatened species or adversely modifying or destroying the critical habitat of any such species''.

Subsecs. (e)(2), (f). Pub. L. 96–159, § 4(3), substituted ''subsection (a)(2)'' for ''subsection (a)''.

Subsec. (g)(1). Pub. L. 96–159, § 4(3), (6), substituted in first sentence ''subsection (a)(2)'' for ''subsection (a)'' of this section and ''agency action would violate subsection (a)(2)'' for ''agency action may jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify the critical habitat of such species''.

Subsec. (g)(2)(A). Pub. L. 96–159, § 4(7), required exemption applicant, to submit a written application, in the case of any agency action involving a permit or license applicant, not later than 90 days after the date on which the Federal agency concerned takes final agency action, for purposes of chapter 7 of Title 5, with respect to the issuance of the permit or license.

Subsec. (g)(3). Pub. L. 96–159, § 4(8), added subpar. (B), and redesignated former subpar. (B) as (C).

Subsec. (g)(5). Pub. L. 96–159, § 4(3), (9), substituted in introductory text and cl. (i) ''subsection (a)(2)'' for ''subsection (a)'' of this section; redesignated as cls. (A) and (B) former cls. (i) and (ii); inserted in cl. (B) ''the Federal agency concerned and'' before ''such exemption applicant''; redesignated as subcls. (i) to (iii) former subcls. (A) to (C); substituted in subcl. (i) ''agency action which would not violate subsection (a)(2) of this section'' for ''agency action which will avoid jeopardizing the continued existence of an endangered or threatened species or result in the adverse modification or destruction of a critical habitat''; and substituted in last sentence ''the Federal agency concerned or the exemption applicant has not met its respective requirements under subclause (i), (ii), or (iii)'' for ''the exemption applicant has not met the requirements of subparagraph (A), (B), or (C)'' preceding ''shall be considered final agency action''.

Subsec. (g)(6). Pub. L. 96–159, § 4(10), substituted ''subclauses (i), (ii), and (iii)'' for ''subparagraphs (A), (B), and (C)'' of paragraph (5).

Subsec. (h)(1). Pub. L. 96–159, § 4(3), substituted ''subsection (a)(2)'' for ''subsection (a)'' of this section.

Subsec. (h)(2). Pub. L. 96–159, § 4(11), in subpar. (A), substituted ''paragraph (1)'' for ''subsection (h) of this section'', inserted cl. (i), incorporated existing provisions in text designated cl. (ii), inserting thereto ''with respect to such agency action''; in subpar. (B), incorporated existing provision in cl. (i), inserted findings provision respecting the extinction of a species that was not: the subject of consultation or identified in any biological assessment under subsec. (a)(2) or (c) of this section, added cl. (ii), deleted prior requirement for a Committee determination within 30 days of the Secretary's finding that an exemption would result in extinction of the species whether to grant an exemption for the agency notwithstanding such finding, and superseded the same with requirement that the Committee meet with respect to the matter within 30 days after the date of such a finding.

Subsec. (m). Pub. L. 96–159, § 4(3), substituted ''subsection (a)(2)'' for ''subsection (a)'' of this section.

Subsec. (q). Pub. L. 96–159, § 4(12), authorized appropriations of $600,000 for fiscal years 1980 through 1982, and deleted appropriations authorization of $300,000 for period beginning Oct. 1, 1979, and ending Mar. 3, 1980, and requirement that the Chairman of the Committee report to the Congress before end of fiscal year 1979 with respect to adequacy of the budget authority.

1978—Subsec. (a). Pub. L. 95–632 designated existing provision as subsec. (a), inserted reference to agency action, substituted ''adverse modification'' for ''modification'', and provided for the grant of an exemption for agency action by the Endangered Species Committee pursuant to subsec. (h) of this section.

Subsecs. (b) to (q). Pub. L. 95–632 added subsecs. (b) to (q).

DEFERRAL OF AGENCY ACTION

Pub. L. 105–18, title II, § 3003, June 12, 1997, 111 Stat. 176, provided that:

''(a) CONSULTATION AND CONFERENCING.—As provided by regulations issued under the Endangered Species Act (16 U.S.C. 1531 et seq.) for emergency situations, formal consultation or conferencing under section 7(a)(2) or section 7(a)(4) of the Act [16 U.S.C. 1536(a)(2), (4)] for any action authorized, funded or carried out by any Federal agency to repair a Federal or non-Federal flood control project, facility or structure may be deferred by the Federal agency authorizing, funding or carrying out the action, if the agency determines that the repair is needed to respond to an emergency causing an imminent threat to human lives and property in 1996 or 1997. Formal consultation or conferencing shall be deferred until the imminent threat to human lives and property has been abated. For purposes of this section, the term repair shall include preventive and remedial measures to restore the project, facility or structure to remove an imminent threat to human lives and property.

''(b) REASONABLE AND PRUDENT MEASURES.—Any reasonable and prudent measures specified under section 7 of the Endangered Species Act (16 U.S.C. 1536) to minimize the impact of an action taken under this section shall be related both in nature and extent to the effect of the action taken to repair the flood control project, facility or structure.''

TRANSLOCATION OF CALIFORNIA SEA OTTERS

Pub. L. 99–625, § 1, Nov. 7, 1986, 100 Stat. 3500, provided that:

''(a) DEFINITIONS.—For purposes of this section—

''(1) The term 'Act' means the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

''(2) The term 'agency action' has the meaning given that term in section 7(a)(2) of the Act [16 U.S.C. 1536(a)(2)].

''(3) The term 'experimental population' means the population of sea otters provided for under a plan developed under subsection (b).

''(4) The phrase 'parent population' means the population of sea otters existing in California on the date on which proposed regulations setting forth a proposed plan under subsection (b) are issued.

''(5) The phrase 'prospective action' refers to any prospective agency action that—

''(A) may affect either the experimental population or the parent population; and

''(B) has evolved to the point where meaningful consultation under section 7(a)(2) or (3) of the Act [16 U.S.C. 1536(a)(2), (3)] can take place.

''(6) The term 'Secretary' means the Secretary of the Interior.

''(7) The term 'Service' means the United States Fish and Wildlife Service.

''(b) PLAN SPECIFICATIONS.—The Secretary may develop and implement, in accordance with this section, a plan for the relocation and management of a population of California sea otters from the existing range of the parent population to another location. The plan, which must be developed by regulation and administered by the Service in cooperation with the appropriate State agency, shall include the following:

''(1) The number, age, and sex of sea otters proposed to be relocated.

''(2) The manner in which the sea otters will be captured, translocated, released, monitored, and protected.

''(3) The specification of a zone (hereinafter referred to as the 'translocation zone') to which the experimental population will be relocated. The zone must have appropriate characteristics for furthering the conservation of the species.

''(4) The specification of a zone (hereinafter referred to as the 'management zone') that—

''(A) surrounds the translocation zone; and

''(B) does not include the existing range of the parent population or adjacent range where expansion is necessary for the recovery of the species.

The purpose of the management zone is to (i) facilitate the management of sea otters and the contain-

ment of the experimental population within the translocation zone, and (ii) to prevent, to the maximum extent feasible, conflict with other fishery resources within the management zone by the experimental population. Any sea otter found within the management zone shall be treated as a member of the experimental population. The Service shall use all feasible non-lethal means and measures to capture any sea otter found within the management zone and return it to either the translocation zone or to the range of the parent population.

''(5) Measures, including an adequate funding mechanism, to isolate and contain the experimental population.

''(6) A description of the relationship of the implementation of the plan to the status of the species under the Act and to determinations of the Secretary under section 7 of the Act [16 U.S.C. 1536].

''(c) STATUS OF MEMBERS OF THE EXPERIMENTAL POPULATION.—(1) Any member of the experimental population shall be treated while within the translocation zone as a threatened species for purposes of the Act, except that—

''(A) section 7 of the Act [16 U.S.C. 1536] shall only apply to agency actions that—

''(i) are undertaken within the translocation zone,

''(ii) are not defense-related agency actions, and

''(iii) are initiated after the date of the enactment of this section [Nov. 7, 1986]; and

''(B) with respect to defense-related actions within the translocation zone, members of the experimental population shall be treated as members of a species that is proposed to be listed under section 4 of the Act [16 U.S.C. 1533].

For purposes of this paragraph, the term 'defense-related agency action' means an agency action proposed to be carried out directly by a military department.

''(2) For purposes of section 7 of the Act [16 U.S.C. 1536], any member of the experimental population shall be treated while within the management zone as a member of a species that is proposed to be listed under section 4 of the Act [16 U.S.C. 1533]. Section 9 of the Act [16 U.S.C. 1538] applies to members of the experimental population; except that any incidental taking of such a member during the course of an otherwise lawful activity within the management zone, may not be treated as a violation of the Act or the Marine Mammal Protection Act of 1972 [16 U.S.C. 1361 et seq.].

''(d) IMPLEMENTATION OF PLAN.—The Secretary shall implement the plan developed under subsection (b)—

''(1) after the Secretary provides an opinion under section 7(b) of the Act [16 U.S.C. 1536(b)] regarding each prospective action for which consultation was initiated by a Federal agency or requested by a prospective permit or license applicant before April 1, 1986; or

''(2) if no consultation under section 7(a)(2) or (3) regarding any prospective action is initiated or requested by April 1, 1986, at any time after that date.

''(e) CONSULTATION AND EFFECT OF OPINION.—A Federal agency shall promptly consult with the Secretary, under section 7(a)(3) of the Act [16 U.S.C. 1536(a)(3)], at the request of, and in cooperation with, any permit or license applicant regarding any prospective action. The time limitations applicable to consultations under section 7(a)(2) of the Act apply to consultations under the preceding sentence. In applying section 7(b)(3)(B) with respect to an opinion on a prospective action that is provided after consultation under section 7(a)(3), that opinion shall be treated as the opinion issued after consultation under section 7(a)(2) unless the Secretary finds, after notice and opportunity for comment in accordance with section 553 of title 5, United States Code, that a significant change has been made with respect to the action or that a significant change has occurred regarding the information used during the initial consultation. The interested party may petition the Secretary to make a finding under the preceding sentence. The Secretary may implement any reasonable and prudent alternatives specified in any opinion referred to in this subsection through appropriate agreements with any such Federal agency, prospective permit or license applicant, or other interested party.

''(f) CONSTRUCTION.—For purposes of implementing the plan, no act by the Service, an authorized State agency, or an authorized agent of the Service or such an agency with respect to a sea otter that is necessary to effect the relocation or management of any sea otter under the plan may be treated as a violation of any provision of the Act or the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.).''

§ 1537. International cooperation

(a) Financial assistance

As a demonstration of the commitment of the United States to the worldwide protection of endangered species and threatened species, the President may, subject to the provisions of section 1306 of title 31, use foreign currencies accruing to the United States Government under the Food for Peace Act [7 U.S.C. 1691 et seq.] or any other law to provide to any foreign country (with its consent) assistance in the development and management of programs in that country which the Secretary determines to be necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to section 1533 of this title. The President shall provide assistance (which includes, but is not limited to, the acquisition, by lease or otherwise, of lands, waters, or interests therein) to foreign countries under this section under such terms and conditions as he deems appropriate. Whenever foreign currencies are available for the provision of assistance under this section, such currencies shall be used in preference to funds appropriated under the authority of section 1542 of this title.

(b) Encouragement of foreign programs

In order to carry out further the provisions of this chapter, the Secretary, through the Secretary of State, shall encourage—

(1) foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to section 1533 of this title;

(2) the entering into of bilateral or multilateral agreements with foreign countries to provide for such conservation; and

(3) foreign persons who directly or indirectly take fish or wildlife or plants in foreign countries or on the high seas for importation into the United States for commercial or other purposes to develop and carry out with such assistance as he may provide, conservation practices designed to enhance such fish or wildlife or plants and their habitat.

(c) Personnel

After consultation with the Secretary of State, the Secretary may—

(1) assign or otherwise make available any officer or employee of his department for the purpose of cooperating with foreign countries and international organizations in developing personnel resources and programs which promote the conservation of fish or wildlife or plants; and

(2) conduct or provide financial assistance for the educational training of foreign person-

(A) to exercise operational or functional control of facilities used for the transmission of electric energy in interstate commerce; and

(B) to ensure nondiscriminatory access to the facilities.[3]

(29) TRANSMISSION ORGANIZATION.—The term ''Transmission Organization'' means a Regional Transmission Organization, Independent System Operator, independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities.

(June 10, 1920, ch. 285, pt. I, § 3, 41 Stat. 1063; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 201, 212, 49 Stat. 838, 847; Pub. L. 95–617, title II, § 201, Nov. 9, 1978, 92 Stat. 3134; Pub. L. 96–294, title VI, § 643(a)(1), June 30, 1980, 94 Stat. 770; Pub. L. 101–575, § 3, Nov. 15, 1990, 104 Stat. 2834; Pub. L. 102–46, May 17, 1991, 105 Stat. 249; Pub. L. 102–486, title VII, § 726, Oct. 24, 1992, 106 Stat. 2921; Pub. L. 109–58, title XII, §§ 1253(b), 1291(b), Aug. 8, 2005, 119 Stat. 970, 984.)

REFERENCES IN TEXT

Section 79z–5a of title 15, referred to in par. (25), was repealed by Pub. L. 109–58, title XII, § 1263, Aug. 8, 2005, 119 Stat. 974.

AMENDMENTS

2005—Par. (17)(C). Pub. L. 109–58, § 1253(b)(1), amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: '' 'qualifying small power production facility' means a small power production facility—

''(i) which the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe; and

''(ii) which is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);''.

Par. (18)(B). Pub. L. 109–58, § 1253(b)(2), amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: '' 'qualifying cogeneration facility' means a cogeneration facility which—

''(i) the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe; and

''(ii) is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);''.

Pars. (22), (23). Pub. L. 109–58, § 1291(b)(1), added pars. (22) and (23) and struck out former pars. (22) and (23) which read as follows:

''(22) 'electric utility' means any person or State agency (including any municipality) which sells electric energy; such term includes the Tennessee Valley Authority, but does not include any Federal power marketing agency.

''(23) TRANSMITTING UTILITY.—The term 'transmitting utility' means any electric utility, qualifying cogeneration facility, qualifying small power production facility, or Federal power marketing agency which owns or operates electric power transmission facilities which are used for the sale of electric energy at wholesale.''

Pars. (26) to (29). Pub. L. 109–58, § 1291(b)(2), added pars. (26) to (29).

1992—Par. (22). Pub. L. 102–486, § 726(b), inserted ''(including any municipality)'' after ''State agency''.

Pars. (23) to (25). Pub. L. 102–486, § 726(a), added pars. (23) to (25).

1991—Par. (17)(E). Pub. L. 102–46 struck out '', and which would otherwise not qualify as a small power production facility because of the power production capacity limitation contained in subparagraph (A)(ii)'' after ''geothermal resources'' in introductory provisions.

1990—Par. (17)(A). Pub. L. 101–575, § 3(a), inserted ''a facility which is an eligible solar, wind, waste, or geothermal facility, or''.

Par. (17)(E). Pub. L. 101–575, § 3(b), added subpar. (E).

1980—Par. (17)(A)(i). Pub. L. 96–294 added applicability to geothermal resources.

1978—Pars. (17) to (22). Pub. L. 95–617 added pars. (17) to (22).

1935—Act Aug. 26, 1935, § 201, amended definitions of ''reservations'' and ''corporations'', and inserted definitions of ''person'', ''licensee'', ''commission'', ''commissioner'', ''State commission'' and ''security''.

FERC REGULATIONS

Pub. L. 101–575, § 4, Nov. 15, 1990, 104 Stat. 2834, provided that: ''Unless the Federal Energy Regulatory Commission otherwise specifies, by rule after enactment of this Act [Nov. 15, 1990], any eligible solar, wind, waste, or geothermal facility (as defined in section 3(17)(E) of the Federal Power Act as amended by this Act [16 U.S.C. 796(17)(E)]), which is a qualifying small power production facility (as defined in subparagraph (C) of section 3(17) of the Federal Power Act as amended by this Act)—

''(1) shall be considered a qualifying small power production facility for purposes of part 292 of title 18, Code of Federal Regulations, notwithstanding any size limitations contained in such part, and

''(2) shall not be subject to the size limitation contained in section 292.601(b) of such part.''

STATE AUTHORITIES; CONSTRUCTION

Pub. L. 102–486, title VII, § 731, Oct. 24, 1992, 106 Stat. 2921, provided that: ''Nothing in this title [enacting sections 824*l*, 824m, and 825*o*–1 of this title and former sections 79z–5a and 79z–5b of Title 15, Commerce and Trade, and amending this section, sections 824, 824j, 824k, 825n, 825*o*, and 2621 of this title, and provisions formerly set out as a note under former section 79k of Title 15] or in any amendment made by this title shall be construed as affecting or intending to affect, or in any way to interfere with, the authority of any State or local government relating to environmental protection or the siting of facilities.''

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND TRANSFER OF FUNCTIONS

Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub. L. 104–88, to Surface Transportation Board effective Jan. 1, 1996, by section 1302 of Title 49, Transportation, and section 101 of Pub. L. 104–88, set out as a note under section 1301 of Title 49. References to Interstate Commerce Commission deemed to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub. L. 104–88, set out as a note under section 1301 of Title 49.

§ 797. General powers of Commission

The Commission is authorized and empowered—

(a) Investigations and data

To make investigations and to collect and record data concerning the utilization of the

[3] So in original. The period probably should be ''; and''.

water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the Commission may deem necessary or useful for the purposes of this chapter.

(b) Statements as to investment of licensees in projects; access to projects, maps, etc.

To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

(c) Cooperation with executive departments; information and aid furnished Commission

To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the Commission, to furnish such records, papers, and information in their possession as may be requested by the Commission, and temporarily to detail to the Commission such officers or experts as may be necessary in such investigations.

(d) Publication of information, etc.; reports to Congress

To make public from time to time the information secured hereunder, and to provide for the publication of its reports and investigations in such form and manner as may be best adapted for public information and use. The Commission, on or before the 3d day of January of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses issued under this subchapter, and in each case the parties thereto, the terms prescribed, and the moneys received if any, or account thereof.

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.

To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation:[1] The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such conditions. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding. Within 90 days of August 8, 2005, the Secretaries of the Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses, in consultation with the Federal Energy Regulatory Commission.[2] *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to

[1] So in original. The colon probably should be a period.
[2] So in original. The period probably should be a colon.

any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

(f) Preliminary permits; notice of application

To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 802 of this title: *Provided, however*, That upon the filing of any application for a preliminary permit by any person, association, or corporation the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part hereof or the lands affected thereby are situated.

(g) Investigation of occupancy for developing power; orders

Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, State, or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

(June 10, 1920, ch. 285, pt. I, § 4, 41 Stat. 1065; June 23, 1930, ch. 572, § 2, 46 Stat. 798; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 202, 212, 49 Stat. 839, 847; July 26, 1947, ch. 343, title II, § 205(a), 61 Stat. 501; Pub. L. 97–375, title II, § 212, Dec. 21, 1982, 96 Stat. 1826; Pub. L. 99–495, § 3(a), Oct. 16, 1986, 100 Stat. 1243; Pub. L. 109–58, title II, § 241(a), Aug. 8, 2005, 119 Stat. 674.)

AMENDMENTS

2005—Subsec. (e). Pub. L. 109–58, which directed amendment of subsec. (e) by inserting after ''adequate protection and utilization of such reservation.'' at end of first proviso ''The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such conditions. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding. Within 90 days of August 8, 2005, the Secretaries of the Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses, in consultation with the Federal Energy Regulatory Commission.'', was executed by making the insertion after ''adequate protection and utilization of such reservation:'' at end of first proviso, to reflect the probable intent of Congress.

1986—Subsec. (e). Pub. L. 99–495 inserted provisions that in deciding whether to issue any license under this subchapter, the Commission, in addition to power and development purposes, is required to give equal consideration to purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife, the protection of recreational opportunities, and the preservation of environmental quality.

1982—Subsec. (d). Pub. L. 97–375 struck out provision that the report contain the names and show the compensation of the persons employed by the Commission.

1935—Subsec. (a). Act Aug. 26, 1935, § 202, struck out last paragraph of subsec. (a) which related to statements of cost of construction, etc., and free access to projects, maps, etc., and is now covered by subsec. (b).

Subsecs. (b), (c). Act Aug. 26, 1935, § 202, added subsec. (b) and redesignated former subsecs. (b) and (c) as (c) and (d), respectively.

Subsec. (d). Act Aug. 26, 1935, § 202, redesignated subsec. (c) as (d) and substituted ''3d day of January'' for ''first Monday in December'' in second sentence. Former subsec. (d) redesignated (e).

Subsec. (e). Act Aug. 26, 1935, § 202, redesignated subsec. (d) as (e) and substituted ''streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States'' for ''navigable waters of the United States'' and ''subsection (f)'' for ''subsection (e)''. Former subsec. (e) redesignated (f).

Subsec. (f). Act Aug. 26, 1935, § 202, redesignated subsec. (e) as (f) and substituted ''once each week for four weeks'' for ''for eight weeks''. Former section (f), which related to the power of the Commission to prescribe regulations for the establishment of a system of accounts and the maintenance thereof, was struck out by act Aug. 26, 1935.

Subsec. (g). Act Aug. 26, 1935, § 202, added subsec. (g). Former subsec. (g), which related to the power of the Commission to hold hearings and take testimony by deposition, was struck out.

Subsec. (h). Act Aug. 26, 1935, § 202, struck out subsec. (h) which related to the power of the Commission to perform any and all acts necessary and proper for the purpose of carrying out the provisions of this chapter.

1930—Subsec. (d). Act June 23, 1930, inserted sentence respecting contents of report.

CHANGE OF NAME

Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted ''Title 10, Armed Forces'' which in sections 3010 to 3013 continued military Department of the Army under administrative supervision of Secretary of the Army.

EFFECTIVE DATE OF 1986 AMENDMENT

Pub. L. 99–495, § 18, Oct. 16, 1986, 100 Stat. 1259, provided that: ''Except as otherwise provided in this Act, the amendments made by this Act [enacting section 823b of this title and amending this section and sections 800, 802, 803, 807, 808, 817, 823a, 824a–3, and 824j of this title] shall take effect with respect to each license, permit, or exemption issued under the Federal Power Act after the enactment of this Act [Oct. 16, 1986]. The amendments made by sections 6 and 12 of this Act [en-

acting section 823b of this title and amending section 817 of this title] shall apply to licenses, permits, and exemptions without regard to when issued.''

SAVINGS PROVISION

Pub. L. 99–495, §17(a), Oct. 16, 1986, 100 Stat. 1259, provided that: ''Nothing in this Act [see Short Title of 1986 Amendment note set out under section 791a of this title] shall be construed as authorizing the appropriation of water by any Federal, State, or local agency, Indian tribe, or any other entity or individual. Nor shall any provision of this Act—

''(1) affect the rights or jurisdiction of the United States, the States, Indian tribes, or other entities over waters of any river or stream or over any ground water resource;

''(2) alter, amend, repeal, interpret, modify, or be in conflict with any interstate compact made by the States;

''(3) alter or establish the respective rights of States, the United States, Indian tribes, or any person with respect to any water or water-related right;

''(4) affect, expand, or create rights to use transmission facilities owned by the Federal Government;

''(5) alter, amend, repeal, interpret, modify, or be in conflict with, the Treaty rights or other rights of any Indian tribe;

''(6) permit the filing of any competing application in any relicensing proceeding where the time for filing a competing application expired before the enactment of this Act [Oct. 16, 1986]; or

''(7) modify, supersede, or affect the Pacific Northwest Electric Power Planning and Conservation Act [16 U.S.C. 839 et seq.].''

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions in subsec. (d) of this section relating to submitting a classified annual report to Congress showing permits and licenses issued under this subchapter, see section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance, and page 91 of House Document No. 103–7.

PROMOTING HYDROPOWER DEVELOPMENT AT NONPOWERED DAMS AND CLOSED LOOP PUMPED STORAGE PROJECTS

Pub. L. 113–23, §6, Aug. 9, 2013, 127 Stat. 495, provided that:

''(a) IN GENERAL.—To improve the regulatory process and reduce delays and costs for hydropower development at nonpowered dams and closed loop pumped storage projects, the Federal Energy Regulatory Commission (referred to in this section as the 'Commission') shall investigate the feasibility of the issuance of a license for hydropower development at nonpowered dams and closed loop pumped storage projects in a 2-year period (referred to in this section as a '2-year process'). Such a 2-year process shall include any prefiling licensing process of the Commission.

''(b) WORKSHOPS AND PILOTS.—The Commission shall—

''(1) not later than 60 days after the date of enactment of this Act [Aug. 9, 2013], hold an initial workshop to solicit public comment and recommendations on how to implement a 2-year process;

''(2) develop criteria for identifying projects featuring hydropower development at nonpowered dams and closed loop pumped storage projects that may be appropriate for licensing within a 2-year process;

''(3) not later than 180 days after the date of enactment of this Act, develop and implement pilot projects to test a 2-year process, if practicable; and

''(4) not later than 3 years after the date of implementation of the final pilot project testing a 2-year process, hold a final workshop to solicit public comment on the effectiveness of each tested 2-year process.

''(c) MEMORANDUM OF UNDERSTANDING.—The Commission shall, to the extent practicable, enter into a memorandum of understanding with any applicable Federal or State agency to implement a pilot project described in subsection (b).

''(d) REPORTS.—

''(1) PILOT PROJECTS NOT IMPLEMENTED.—If the Commission determines that no pilot project described in subsection (b) is practicable because no 2-year process is practicable, not later than 240 days after the date of enactment of this Act [Aug. 9, 2013], the Commission shall submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Energy and Natural Resources of the Senate a report that—

''(A) describes the public comments received as part of the initial workshop held under subsection (b)(1); and

''(B) identifies the process, legal, environmental, economic, and other issues that justify the determination of the Commission that no 2-year process is practicable, with recommendations on how Congress may address or remedy the identified issues.

''(2) PILOT PROJECTS IMPLEMENTED.—If the Commission develops and implements pilot projects involving a 2-year process, not later than 60 days after the date of completion of the final workshop held under subsection (b)(4), the Commission shall submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Energy and Natural Resources of the Senate a report that—

''(A) describes the outcomes of the pilot projects;

''(B) describes the public comments from the final workshop on the effectiveness of each tested 2-year process; and

''(C)(i) outlines how the Commission will adopt policies under existing law (including regulations) that result in a 2-year process for appropriate projects;

''(ii) outlines how the Commission will issue new regulations to adopt a 2-year process for appropriate projects; or

''(iii) identifies the process, legal, environmental, economic, and other issues that justify a determination of the Commission that no 2-year process is practicable, with recommendations on how Congress may address or remedy the identified issues.''

IMPROVEMENT AT EXISTING FEDERAL FACILITIES

Pub. L. 102–486, title XXIV, §2404, Oct. 24, 1992, 106 Stat. 3097, as amended by Pub. L. 103–437, §6(d)(37), Nov. 2, 1994, 108 Stat. 4585; Pub. L. 104–66, title I, §1052(h), Dec. 21, 1995, 109 Stat. 718, directed Secretary of the Interior and Secretary of the Army, in consultation with Secretary of Energy, to perform reconnaissance level studies, for each of the Nation's principal river basins, of cost effective opportunities to increase hydropower production at existing federally-owned or operated water regulation, storage, and conveyance facilities, with such studies to be completed within 2 years after Oct. 24, 1992, and transmitted to Congress, further provided that in cases where such studies had been prepared by any agency of the United States and published within ten years prior to Oct. 24, 1992, Secretary of the Interior, or Secretary of the Army, could choose to rely on information developed by prior studies rather than conduct new studies, and further provided for appropriations for fiscal years 1993 to 1995.

WATER CONSERVATION AND ENERGY PRODUCTION

Pub. L. 102–486, title XXIV, §2405, Oct. 24, 1992, 106 Stat. 3098, provided that:

''(a) STUDIES.—The Secretary of the Interior, acting pursuant to the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388) [see Short Title note under section 371 of Title 43, Public Lands], and Acts supplementary thereto and amendatory thereof, is authorized and directed to conduct feasibility investigations of opportunities to increase the amount of hydroelectric energy available for marketing by the Secretary from Federal hydroelectric power generation facilities resulting

from a reduction in the consumptive use of such power for Federal reclamation project purposes or as a result of an increase in the amount of water available for such generation because of water conservation efforts on Federal reclamation projects or a combination thereof. The Secretary of the Interior is further authorized and directed to conduct feasibility investigations of opportunities to mitigate damages to or enhance fish and wildlife as a result of increasing the amount of water available for such purposes because of water conservation efforts on Federal reclamation projects. Such feasibility investigations shall include, but not be limited to—

''(1) an analysis of the technical, environmental, and economic feasibility of reducing the amount of water diverted upstream of such Federal hydroelectric power generation facilities by Federal reclamation projects;

''(2) an estimate of the reduction, if any, of project power consumed as a result of the decreased amount of diversion;

''(3) an estimate of the increase in the amount of electrical energy and related revenues which would result from the marketing of such power by the Secretary;

''(4) an estimate of the fish and wildlife benefits which would result from the decreased or modified diversions;

''(5) a finding by the Secretary of the Interior that the activities proposed in the feasibility study can be carried out in accordance with applicable Federal and State law, interstate compacts and the contractual obligations of the Secretary; and

''(6) a finding by the affected Federal Power Marketing Administrator that the hydroelectric component of the proposed water conservation feature is cost-effective and that the affected Administrator is able to market the hydro-electric power expected to be generated.

''(b) CONSULTATION.—In preparing feasibility studies pursuant to this section, the Secretary of the Interior shall consult with, and seek the recommendations of, affected State, local and Indian tribal interests, and shall provide for appropriate public comment.

''(c) AUTHORIZATION.—There is hereby authorized to be appropriated to the Secretary of the Interior such sums as may be necessary to carry out this section.''

PROJECTS ON FRESH WATERS IN STATE OF HAWAII

Pub. L. 102–486, title XXIV, § 2408, Oct. 24, 1992, 106 Stat. 3100, directed Federal Energy Regulatory Commission, in consultation with State of Hawaii, to carry out study of hydroelectric licensing in State of Hawaii for purposes of considering whether such licensing should be transferred to State, and directed Commission to complete study and submit report containing results of study to Congress within 18 months after Oct. 24, 1992.

§ 797a. Congressional authorization for permits, licenses, leases, or authorizations for dams, conduits, reservoirs, etc., within national parks or monuments

On and after March 3, 1921, no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits as constituted, March 3, 1921, of any national park or national monument shall be granted or made without specific authority of Congress.

(Mar. 3, 1921, ch. 129, 41 Stat. 1353.)

CODIFICATION

Provisions repealing so much of this chapter ''as authorizes licensing such uses of existing national parks and national monuments by the Federal Power Commission'' have been omitted.

Section was not enacted as part of the Federal Power Act which generally comprises this chapter.

Section 212 of act Aug. 26, 1935, ch. 687, title II, 49 Stat. 847, provided that nothing in this chapter, as amended should be construed to repeal or amend the provisions of the act approved Mar. 3, 1921 (41 Stat. 1353) [16 U.S.C. 797a] or the provisions of any other Act relating to national parks and national monuments.

§ 797b. Duty to keep Congress fully and currently informed

The Federal Energy Regulatory Commission shall keep the Committee on Energy and Commerce of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate fully and currently informed regarding actions of the Commission with respect to the provisions of Part I of the Federal Power Act [16 U.S.C. 791a et seq.].

(Pub. L. 99–495, § 16, Oct. 16, 1986, 100 Stat. 1259.)

REFERENCES IN TEXT

The Federal Power Act, referred to in text, is act June 10, 1920, ch. 285, 41 Stat. 1063, as amended. Part I of the Federal Power Act is classified generally to this subchapter (§ 791a et seq.). For complete classification of this Act to the Code, see section 791a of this title and Tables.

CODIFICATION

Section was enacted as part of the Electric Consumers Protection Act of 1986, and not as part of the Federal Power Act which generally comprises this chapter.

CHANGE OF NAME

Committee on Energy and Commerce of House of Representatives treated as referring to Committee on Commerce of House of Representatives by section 1(a) of Pub. L. 104–14, set out as a note preceding section 21 of Title 2, The Congress. Committee on Commerce of House of Representatives changed to Committee on Energy and Commerce of House of Representatives, and jurisdiction over matters relating to securities and exchanges and insurance generally transferred to Committee on Financial Services of House of Representatives by House Resolution No. 5, One Hundred Seventh Congress, Jan. 3, 2001.

§ 797c. Dams in National Park System units

After October 24, 1992, the Federal Energy Regulatory Commission may not issue an original license under Part I of the Federal Power Act [16 U.S.C. 791a et seq.] (nor an exemption from such Part) for any new hydroelectric power project located within the boundaries of any unit of the National Park System that would have a direct adverse effect on Federal lands within any such unit. Nothing in this section shall be construed as repealing any existing provision of law (or affecting any treaty) explicitly authorizing a hydroelectric power project.

(Pub. L. 102–486, title XXIV, § 2402, Oct. 24, 1992, 106 Stat. 3097.)

REFERENCES IN TEXT

The Federal Power Act, referred to in text, is act June 10, 1920, ch. 285, 41 Stat. 1063, as amended. Part I of the Act is classified generally to this subchapter (§ 791a et seq.). For complete classification of this Act to the Code, see section 791a of this title and Tables.

DEFINITION OF INDIAN TRIBE

Pub. L. 115–325, title II, §201(c), Dec. 18, 2018, 132 Stat. 4459, provided that: ''For purposes of section 7(a) of the Federal Power Act (16 U.S.C. 800(a)) (as amended by subsection (a)), the term 'Indian tribe' has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304).''

§ 801. Transfer of license; obligations of transferee

No voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this chapter to the same extent as though such successor or assign were the original licensee under this chapter: *Provided*, That a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section.

(June 10, 1920, ch. 285, pt. I, §8, 41 Stat. 1068; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, §212, 49 Stat. 847.)

§ 802. Information to accompany application for license; landowner notification

(a) Each applicant for a license under this chapter shall submit to the commission—

(1) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

(2) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.

(3)[1] Such additional information as the commission may require.

(b) Upon the filing of any application for a license (other than a license under section 808 of this title) the applicant shall make a good faith effort to notify each of the following by certified mail:

(1) Any person who is an owner of record of any interest in the property within the bounds of the project.

(2) Any Federal, State, municipal or other local governmental agency likely to be interested in or affected by such application.

(June 10, 1920, ch. 285, pt. I, §9, 41 Stat. 1068; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, §212, 49 Stat. 847; Pub. L. 99–495, §14, Oct. 16, 1986, 100 Stat. 1257.)

CODIFICATION

Former subsec. (c), included in the provisions designated as subsec. (a) by Pub. L. 99–495, has been editorially redesignated as par. (3) of subsec. (a) as the probable intent of Congress.

AMENDMENTS

1986—Pub. L. 99–495 designated existing provisions as subsec. (a), redesignated former subsecs. (a) and (b) as pars. (1) and (2) of subsec. (a), and added subsec. (b).

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99–495, set out as a note under section 797 of this title.

§ 803. Conditions of license generally

All licenses issued under this subchapter shall be on the following conditions:

(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title[1] if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan described in paragraph (1), the Commission shall consider each of the following:

(A) The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by—

(i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or

(ii) the State in which the facility is or will be located.

(B) The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(C) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric

[1] See Codification note below.

[1] So in original. Probably should be followed by ''; and''.

power (other than electric power solely from cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.

(3) Upon receipt of an application for a license, the Commission shall solicit recommendations from the agencies and Indian tribes identified in subparagraphs (A) and (B) of paragraph (2) for proposed terms and conditions for the Commission's consideration for inclusion in the license.

(b) Alterations in project works

That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of two thousand horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

(c) Maintenance and repair of project works; liability of licensee for damages

That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain, and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license and in no event shall the United States be liable therefor.

(d) Amortization reserves

That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license. For any new license issued under section 808 of this title, the amortization reserves under this subsection shall be maintained on and after the effective date of such new license.

(e) Annual charges payable by licensees; maximum rates; application; review and report to Congress

(1) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter, including any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under this subchapter; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That, subject to annual appropriations Acts, the portion of such annual charges imposed by the Commission under this subsection to cover the reasonable and necessary costs of such agencies shall be available to such agencies (in addition to other funds appropriated for such purposes) solely for carrying out such studies and reviews and shall remain available until expended: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 5123 of title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be

such as determined by the Commission: *Provided however*, That no charge shall be assessed for the use of any Government dam or structure by any licensee if, before January 1, 1985, the Secretary of the Interior has entered into a contract with such licensee that meets each of the following requirements:

(A) The contract covers one or more projects for which a license was issued by the Commission before January 1, 1985.

(B) The contract contains provisions specifically providing each of the following:

(i) A powerplant may be built by the licensee utilizing irrigation facilities constructed by the United States.

(ii) The powerplant shall remain in the exclusive control, possession, and ownership of the licensee concerned.

(iii) All revenue from the powerplant and from the use, sale, or disposal of electric energy from the powerplant shall be, and remain, the property of such licensee.

(C) The contract is an amendatory, supplemental and replacement contract between the United States and: (i) the Quincy-Columbia Basin Irrigation District (Contract No. 14–06–100–6418); (ii) the East Columbia Basin Irrigation District (Contract No. 14–06–100–6419); or, (iii) the South Columbia Basin Irrigation District (Contract No. 14–06–100–6420).

This paragraph shall apply to any project covered by a contract referred to in this paragraph only during the term of such contract unless otherwise provided by subsequent Act of Congress. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

(2) In the case of licenses involving the use of Government dams or other structures owned by the United States, the charges fixed (or readjusted) by the Commission under paragraph (1) for the use of such dams or structures shall not exceed 1 mill per kilowatt-hour for the first 40 gigawatt-hours of energy a project produces in any year, 1½ mills per kilowatt-hour for over 40 up to and including 80 gigawatt-hours in any year, and 2 mills per kilowatt-hour for any energy the project produces over 80 gigawatt-hours in any year. Except as provided in subsection (f), such charge shall be the only charge assessed by any agency of the United States for the use of such dams or structures.

(3) The provisions of paragraph (2) shall apply with respect to—

(A) all licenses issued after October 16, 1986; and

(B) all licenses issued before October 16, 1986, which—

(i) did not fix a specific charge for the use of the Government dam or structure involved; and

(ii) did not specify that no charge would be fixed for the use of such dam or structure.

(4) Every 5 years, the Commission shall review the appropriateness of the annual charge limitations provided for in this subsection and report to Congress concerning its recommendations thereon.

(f) Reimbursement by licensee of other licensees, etc.

That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission. The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission.

Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 810 of this title.

Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such headwater improvement.

(g) Conditions in discretion of commission

Such other conditions not inconsistent with the provisions of this chapter as the commission may require.

(h) Monopolistic combinations; prevention or minimization of anticompetitive conduct; action by Commission regarding license and operation and maintenance of project

(1) Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

(2) That conduct under the license that: (A) results in the contravention of the policies expressed in the antitrust laws; and (B) is not otherwise justified by the public interest considering regulatory policies expressed in other applicable law (including but not limited to those contained in subchapter II of this chapter) shall be prevented or adequately minimized by means of conditions included in the license prior to its issuance. In the event it is impossible to prevent or adequately minimize the contravention, the Commission shall refuse to issue any license to the applicant for the project and, in the case of an existing project, shall take appropriate action to provide thereafter for the operation and maintenance of the affected project and for the issuing of a new license in accordance with section 808 of this title.

(i) Waiver of conditions

In issuing licenses for a minor part only of a complete project, or for a complete project of not more than two thousand horsepower installed capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of this subchapter, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: *Provided*, That the provisions hereof shall not apply to annual charges for use of lands within Indian reservations.

(j) Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings

(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this subchapter or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

(A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this subchapter or with other applicable provisions of law.

(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1).

Subsection (i) shall not apply to the conditions required under this subsection.

(June 10, 1920, ch. 285, pt. I, § 10, 41 Stat. 1068; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 206, 212, 49 Stat. 842, 847; Pub. L. 87–647, Sept. 7, 1962, 76 Stat. 447; Pub. L. 90–451, § 4, Aug. 3, 1968, 82 Stat. 617; Pub. L. 99–495, §§ 3(b), (c), 9(a), 13, Oct. 16, 1986, 100 Stat. 1243, 1244, 1252, 1257; Pub. L. 99–546, title IV, § 401, Oct. 27, 1986, 100 Stat. 3056; Pub. L. 102–486, title XVII, § 1701(a), Oct. 24, 1992, 106 Stat. 3008.)

REFERENCES IN TEXT

The Fish and Wildlife Coordination Act, referred to in subsec. (j)(1), is act Mar. 10, 1934, ch. 55, 48 Stat. 401, as amended, which is classified generally to sections 661 to 666c of this title. For complete classification of this Act to the Code, see Short Title note set out under section 661 of this title and Tables.

AMENDMENTS

1992—Subsec. (e)(1). Pub. L. 102–486, in introductory provisions, substituted ''administration of this subchapter, including any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under this subchapter;'' for ''administration of this subchapter;'' and inserted ''*Provided*, That, subject to annual appropriations Acts, the portion of such annual charges imposed by the Commission under this subsection to cover the reasonable and necessary costs of such agencies shall be available to such agencies (in addition to other funds appropriated for such purposes) solely for carrying out such studies and reviews and shall remain available until expended:'' after ''as conditions may require:''.

1986—Subsec. (a). Pub. L. 99–495, § 3(b), designated existing provisions as par. (1), inserted ''for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat),'' after ''water-power development'', inserted ''irrigation, flood control, water supply, and'' after ''including'', which words were inserted after ''public uses, including'' as the probable intent of Congress, substituted ''and other purposes referred to in section 797(e) of this title'' for ''purposes; and'', and added pars. (2) and (3).

Subsec. (e). Pub. L. 99–546 inserted proviso that no charge be assessed for use of Government dam or structure by licensee if, before Jan. 1, 1985, licensee and Secretary entered into contract which met requirements of date of license, powerplant construction, ownership, and revenue, etc.

Pub. L. 99–495, § 9(a), designated existing provisions as par. (1) and added pars. (2) to (4).

Subsec. (h). Pub. L. 99–495, § 13, designated existing provisions as par. (1) and added par. (2).

Subsec. (j). Pub. L. 99–495, § 3(c), added subsec. (j).

1968—Subsec. (d). Pub. L. 90–451 provided for maintenance of amortization reserves on and after effective date of new licenses.

1962—Subsecs. (b), (e), (i). Pub. L. 87–647 substituted ''two thousand horsepower'' for ''one hundred horsepower''.

1935—Subsec. (a). Act Aug. 26, 1935, § 206, substituted ''plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial uses, including recreational purposes'' for ''scheme of improvement and utilization for the purposes of navigation, of water-power development, and of other beneficial public uses,'' and ''such plan'' for ''such scheme''.

Subsec. (b). Act Aug. 26, 1935, § 206, inserted ''installed'' before ''capacity''.

Subsec. (d). Act Aug. 26, 1935, § 206, substituted ''net investment'' for ''actual, legitimate investment''.

Subsec. (e). Act Aug. 26, 1935, § 206, amended subsec. (e) generally.

Subsec. (f). Act Aug. 26, 1935, § 206, inserted last sentence to first par., and inserted last par.

Subsec. (i). Act Aug. 26, 1935, § 206, inserted ''installed'' before ''capacity'', and ''annual charges for use of'' before ''lands'' in proviso.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99–495, set out as a note under section 797 of this title.

SAVINGS PROVISION

Pub. L. 99–495, § 9(b), Oct. 16, 1986, 100 Stat. 1252, provided that: ''Nothing in this Act [see Short Title of 1986 Amendment note set out under section 791a of this title] shall affect any annual charge to be paid pursuant to section 10(e) of the Federal Power Act [16 U.S.C.

803(e)] to Indian tribes for the use of their lands within Indian reservations.''

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions in subsec. (e)(4) of this section relating to reporting recommendations to Congress every 5 years, see section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance, and page 91 of House Document No. 103–7.

OBLIGATION FOR PAYMENT OF ANNUAL CHARGES

Pub. L. 115–270, title III, §3001(c), Oct. 23, 2018, 132 Stat. 3862, provided that: ''Any obligation of a licensee or exemptee for the payment of annual charges under section 10(e) of the Federal Power Act (16 U.S.C. 803(e)) for a project that has not commenced construction as of the date of enactment of this Act [Oct. 23, 2018] shall commence not earlier than the latest of—

''(1) the date by which the licensee or exemptee is required to commence construction; or

''(2) the date of any extension of the deadline under paragraph (1).''

§ 804. Project works affecting navigable waters; requirements insertable in license

If the dam or other project works are to be constructed across, along, or in any of the navigable waters of the United States, the commission may, insofar as it deems the same reasonably necessary to promote the present and future needs of navigation and consistent with a reasonable investment cost to the licensee, include in the license any one or more of the following provisions or requirements:

(a) That such licensee shall, to the extent necessary to preserve and improve navigation facilities, construct, in whole or in part, without expense to the United States, in connection with such dam, a lock or locks, booms, sluices, or other structures for navigation purposes, in accordance with plans and specifications approved by the Chief of Engineers and the Secretary of the Army and made part of such license.

(b) That in case such structures for navigation purposes are not made a part of the original construction at the expense of the licensee, then whenever the United States shall desire to complete such navigation facilities the licensee shall convey to the United States, free of cost, such of its land and its rights-of-way and such right of passage through its dams or other structures, and permit such control of pools as may be required to complete such navigation facilities.

(c) That such licensee shall furnish free of cost to the United States power for the operation of such navigation facilities, whether constructed by the licensee or by the United States.

(June 10, 1920, ch. 285, pt. I, §11, 41 Stat. 1070; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, §212, 49 Stat. 847; July 26, 1947, ch. 343, title II, §205(a), 61 Stat. 501.)

CHANGE OF NAME

Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted ''Title 10, Armed Forces'' which in sections 3010 to 3013 continued military Department of the Army under administrative supervision of Secretary of the Army.

§ 805. Participation by Government in costs of locks, etc.

Whenever application is filed for a project hereunder involving navigable waters of the United States, and the commission shall find upon investigation that the needs of navigation require the construction of a lock or locks or other navigation structures, and that such structures cannot, consistent with a reasonable investment cost to the applicant, be provided in the manner specified in subsection (a) of section 804 of this title, the commission may grant the application with the provision to be expressed in the license that the licensee will install the necessary navigation structures if the Government fails to make provision therefor within a time to be fixed in the license and cause a report upon such project to be prepared, with estimates of cost of the power development and of the navigation structures, and shall submit such report to Congress with such recommendations as it deems appropriate concerning the participation of the United States in the cost of construction of such navigation structures.

(June 10, 1920, ch. 285, pt. I, §12, 41 Stat. 1070; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, §212, 49 Stat. 847.)

§ 806. Time limit for construction of project works; extension of time; termination or revocation of licenses for delay

The licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the commission shall deem necessary to supply the reasonable needs of the then available market, and shall from time to time thereafter construct such portion of the balance of such development as the commission may direct, so as to supply adequately the reasonable market demands until such development shall have been completed. The periods for the commencement of construction may be extended for not more than 8 additional years, and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the commission. In case the construction of the project works, or of any specified part thereof, has been begun but not completed within the time prescribed in the license, or as extended by the commission, then the Attorney General, upon the request of the commission, shall institute proceedings in equity in the district court of the United States for the dis-

Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

(June 10, 1920, ch. 285, pt. III, §311, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859.)

§825k. Publication and sale of reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Director of the Government Publishing Office under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Publishing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, §312, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859; amended Pub. L. 113–235, div. H, title I, §1301(b), (d), Dec. 16, 2014, 128 Stat. 2537.)

CODIFICATION

''Sections 1535 and 1536 of title 31'' substituted in text for ''sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

CHANGE OF NAME

''Director of the Government Publishing Office'' substituted for ''Public Printer'' in text on authority of section 1301(d) of Pub. L. 113–235, set out as a note under section 301 of Title 44, Public Printing and Documents.

''Government Publishing Office'' substituted for ''Government Printing Office'' in text on authority of section 1301(b) of Pub. L. 113–235, set out as a note preceding section 301 of Title 44, Public Printing and Documents.

§825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided

in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, § 313, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 860; amended June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, § 1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, § 16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, § 16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Writs of mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Prohibitions on violators

In any proceedings under subsection (a), the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 824u of this title (and related rules and regulations) from—

(1) acting as an officer or director of an electric utility; or

(2) engaging in the business of purchasing or selling—

(A) electric energy; or

(B) transmission services subject to the jurisdiction of the Commission.

the preservation and enhancement of the environment.

(Pub. L. 91–190, title I, § 101, Jan. 1, 1970, 83 Stat. 852.)

COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE

Pub. L. 91–213, §§ 1–9, Mar. 16, 1970, 84 Stat. 67–69, established the Commission on Population Growth and the American Future to conduct and sponsor such studies and research and make such recommendations as might be necessary to provide information and education to all levels of government in the United States, and to our people regarding a broad range of problems associated with population growth and their implications for America's future; prescribed the composition of the Commission; provided for the appointment of its members, and the designation of a Chairman and Vice Chairman; required a majority of the members of the Commission to constitute a quorum, but allowed a lesser number to conduct hearings; prescribed the compensation of members of the Commission; required the Commission to conduct an inquiry into certain prescribed aspects of population growth in the United States and its foreseeable social consequences; provided for the appointment of an Executive Director and other personnel and prescribed their compensation; authorized the Commission to enter into contracts with public agencies, private firms, institutions, and individuals for the conduct of research and surveys, the preparation of reports, and other activities necessary to the discharge of its duties, and to request from any Federal department or agency any information and assistance it deems necessary to carry out its functions; required the General Services Administration to provide administrative services for the Commission on a reimbursable basis; required the Commission to submit an interim report to the President and the Congress one year after it was established and to submit its final report two years after Mar. 16, 1970; terminated the Commission sixty days after the date of the submission of its final report; and authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such amounts as might be necessary to carry out the provisions of Pub. L. 91–213.

EXECUTIVE ORDER NO. 11507

Ex. Ord. No. 11507, eff. Feb. 4, 1970, 35 F.R. 2573, which related to prevention, control, and abatement of air and water pollution at federal facilities was superseded by Ex. Ord. No. 11752, eff. Dec. 17, 1973, 38 F.R. 34793, formerly set out below.

EXECUTIVE ORDER NO. 11752

Ex. Ord. No. 11752, Dec. 17, 1973, 38 F.R. 34793, which related to the prevention, control, and abatement of environmental pollution at Federal facilities, was revoked by Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of this title.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibil-

ities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

(Pub. L. 91–190, title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub. L. 94–83, Aug. 9, 1975, 89 Stat. 424.)

AMENDMENTS

1975—Subpars. (D) to (I). Pub. L. 94–83 added subpar. (D) and redesignated former subpars. (D) to (H) as (E) to (I), respectively.

CERTAIN COMMERCIAL SPACE LAUNCH ACTIVITIES

Pub. L. 104–88, title IV, § 401, Dec. 29, 1995, 109 Stat. 955, provided that: ''The licensing of a launch vehicle or launch site operator (including any amendment, extension, or renewal of the license) under [former] chapter 701 of title 49, United States Code [now chapter 509 (§ 50901 et seq.) of Title 51, National and Commercial Space Programs], shall not be considered a major Federal action for purposes of section 102(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(C)) if—

''(1) the Department of the Army has issued a permit for the activity; and

''(2) the Army Corps of Engineers has found that the activity has no significant impact.''

EX. ORD. NO. 13352. FACILITATION OF COOPERATIVE CONSERVATION

Ex. Ord. No. 13352, Aug. 26, 2004, 69 F.R. 52989, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

SECTION 1. *Purpose*. The purpose of this order is to ensure that the Departments of the Interior, Agriculture, Commerce, and Defense and the Environmental Protection Agency implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation, with an emphasis on appropriate inclusion of local participation in Federal decisionmaking, in accordance with their respective agency missions, policies, and regulations.

SEC. 2. *Definition*. As used in this order, the term ''cooperative conservation'' means actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals.

SEC. 3. *Federal Activities*. To carry out the purpose of this order, the Secretaries of the Interior, Agriculture, Commerce, and Defense and the Administrator of the Environmental Protection Agency shall, to the extent permitted by law and subject to the availability of appropriations and in coordination with each other as appropriate:

(a) carry out the programs, projects, and activities of the agency that they respectively head that implement laws relating to the environment and natural resources in a manner that:

(i) facilitates cooperative conservation;

(ii) takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land and other natural resources;

(iii) properly accommodates local participation in Federal decisionmaking; and

(iv) provides that the programs, projects, and activities are consistent with protecting public health and safety;

(b) report annually to the Chairman of the Council on Environmental Quality on actions taken to implement this order; and

(c) provide funding to the Office of Environmental Quality Management Fund (42 U.S.C. 4375) for the Conference for which section 4 of this order provides.

SEC. 4. *White House Conference on Cooperative Conservation*. The Chairman of the Council on Environmental Quality shall, to the extent permitted by law and subject to the availability of appropriations:

(a) convene not later than 1 year after the date of this order, and thereafter at such times as the Chairman deems appropriate, a White House Conference on Cooperative Conservation (Conference) to facilitate the exchange of information and advice relating to (i) cooperative conservation and (ii) means for achievement of the purpose of this order; and

(b) ensure that the Conference obtains information in a manner that seeks from Conference participants their individual advice and does not involve collective judgment or consensus advice or deliberation.

SEC. 5. *General Provision*. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

GEORGE W. BUSH.

§ 4332a. Repealed. Pub. L. 114–94, div. A, title I, § 1304(j)(2), Dec. 4, 2015, 129 Stat. 1386

Section, Pub. L. 112–141, div. A, title I, § 1319, July 6, 2012, 126 Stat. 551, related to accelerated decisionmaking in environmental reviews.

EFFECTIVE DATE OF REPEAL

Repeal effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as an Effective Date of 2015 Amendment note under section 5313 of Title 5, Government Organization and Employees.

§ 4333. Conformity of administrative procedures to national environmental policy

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter

[1] So in original. The period probably should be a semicolon.

the biological assessment requirement for the proposed action by incorporating by reference the earlier biological assessment, plus any supporting data from other documents that are pertinent to the consultation, into a written certification that:

(1) The proposed action involves similar impacts to the same species in the same geographic area;

(2) No new species have been listed or proposed or no new critical habitat designated or proposed for the action area; and

(3) The biological assessment has been supplemented with any relevant changes in information.

(h) *Permit requirements.* If conducting a biological assessment will involve the taking of a listed species, a permit under section 10 of the Act (16 U.S.C. 1539) and part 17 of this title (with respect to species under the jurisdiction of the FWS) or parts 220, 222, and 227 of this title (with respect to species under the jurisdiction of the NMFS) is required.

(i) *Completion time.* The Federal agency or the designated non- Federal representative shall complete the biological assessment within 180 days after its initiation (receipt of or concurrence with the species list) unless a different period of time is agreed to by the Director and the Federal agency. If a permit or license applicant is involved, the 180-day period may not be extended unless the agency provides the applicant, before the close of the 180-day period, with a written statement setting forth the estimated length of the proposed extension and the reasons why such an extension is necessary.

(j) *Submission of biological assessment.* The Federal agency shall submit the completed biological assessment to the Director for review. The Director will respond in writing within 30 days as to whether or not he concurs with the findings of the biological assessment. At the option of the Federal agency, formal consultation may be initiated under §402.14(c) concurrently with the submission of the assessment.

(k) *Use of the biological assessment.* (1) The Federal agency shall use the biological assessment in determining whether formal consultation or a conference is required under §402.14 or §402.10, respectively. If the biological assessment indicates that there are no listed species or critical habitat present that are likely to be adversely affected by the action and the Director concurs as specified in paragraph (j) of this section, then formal consultation is not required. If the biological assessment indicates that the action is not likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat, and the Director concurs, then a conference is not required.

(2) The Director may use the results of the biological assessment in (i) determining whether to request the Federal agency to initiate formal consultation or a conference, (ii) formulating a biological opinion, or (iii) formulating a preliminary biological opinion.

§ 402.13 Informal consultation.

(a) Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required. If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

(b) During informal consultation, the Service may suggest modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat.

[74 FR 20423, May 4, 2009]

EFFECTIVE DATE NOTE: At 84 FR 45016, Aug. 27, 2019, §402.13 was amended by revising paragraph (a) and adding paragraph (c), effective Sept. 26, 2019. At 84 FR 50333, Sept. 25, 2019, this rule was delayed until Oct. 28, 2019. For the convenience of the user, the added and revised text is set forth as follows:

§ 402.13 Informal consultation.

(a) Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and

the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required.

* * * * *

(c) If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

(1) A written request for concurrence with a Federal agency's not likely to adversely affect determination shall include information similar to the types of information described for formal consultation at § 402.14(c)(1) sufficient for the Service to determine if it concurs.

(2) Upon receipt of a written request consistent with paragraph (c)(1) of this section, the Service shall provide written concurrence or non-concurrence with the Federal agency's determination within 60 days. The 60-day timeframe may be extended upon mutual consent of the Service, the Federal agency, and the applicant (if involved), but shall not exceed 120 days total from the date of receipt of the Federal agency's written request consistent with paragraph (c)(1) of this section.

§ 402.14 Formal consultation.

(a) *Requirement for formal consultation.* Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) *Exceptions.* (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(c) *Initiation of formal consultation.* A written request to initiate formal consultation shall be submitted to the Director and shall include:

(1) A description of the action to be considered;

(2) A description of the specific area that may be affected by the action;

(3) A description of any listed species or critical habitat that may be affected by the action;

(4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;

(5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and

(6) Any other relevant available information on the action, the affected listed species, or critical habitat.

Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12. Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.

(d) *Responsibility to provide best scientific and commercial data available.* The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall

the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required.

* * * * *

(c) If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

(1) A written request for concurrence with a Federal agency's not likely to adversely affect determination shall include information similar to the types of information described for formal consultation at § 402.14(c)(1) sufficient for the Service to determine if it concurs.

(2) Upon receipt of a written request consistent with paragraph (c)(1) of this section, the Service shall provide written concurrence or non-concurrence with the Federal agency's determination within 60 days. The 60-day timeframe may be extended upon mutual consent of the Service, the Federal agency, and the applicant (if involved), but shall not exceed 120 days total from the date of receipt of the Federal agency's written request consistent with paragraph (c)(1) of this section.

§ 402.14 Formal consultation.

(a) *Requirement for formal consultation.* Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) *Exceptions.* (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(c) *Initiation of formal consultation.* A written request to initiate formal consultation shall be submitted to the Director and shall include:

(1) A description of the action to be considered;

(2) A description of the specific area that may be affected by the action;

(3) A description of any listed species or critical habitat that may be affected by the action;

(4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;

(5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and

(6) Any other relevant available information on the action, the affected listed species, or critical habitat.

Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12. Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.

(d) *Responsibility to provide best scientific and commercial data available.* The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall

provide any applicant with the opportunity to submit information for consideration during the consultation.

(e) *Duration and extension of formal consultation.* Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

(1) The reasons why a longer period is required,

(2) The information that is required to complete the consultation, and

(3) The estimated date on which the consultation will be completed. A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) *Additional data.* When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to § 402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

(g) *Service responsibilities.* Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1) through (3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service

is entitled to an automatic 10-day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take is reasonably certain to occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

(h) *Biological opinions.* The biological opinion shall include:

(1) A summary of the information on which the opinion is based;

(2) A detailed discussion of the effects of the action on listed species or critical habitat; and

(3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a ''jeopardy biological opinion''); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a ''no jeopardy'' biological opinion). A ''jeopardy'' biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(i) *Incidental take.* (1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, *i.e.*, the amount or extent, of such incidental taking on the species (A surrogate (*e.g.*, similarly affected species or habitat or ecological conditions) may be used to express the amount or extent of anticipated take provided that the biological opinion or incidental take statement: Describes the causal link between the surrogate and take of the listed species, explains why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and sets a clear standard for determining when the level of anticipated take has been exceeded.);

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be established in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 216.105 and 222.301(h) for NMFS.

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the

Federal agency must reinitiate consultation immediately.

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(6) For a framework programmatic action, an incidental take statement is not required at the programmatic level; any incidental take resulting from any action subsequently authorized, funded, or carried out under the program will be addressed in subsequent section 7 consultation, as appropriate. For a mixed programmatic action, an incidental take statement is required at the programmatic level only for those program actions that are reasonably certain to cause take and are not subject to further section 7 consultation.

(j) *Conservation recommendations.* The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

(k) *Incremental steps.* When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if:

(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);

(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;

(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;

(4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and

(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

(l) *Termination of consultation.* (1) Formal consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.

[51 FR 19957, June 3, 1986, as amended at 54 FR 40350, Sept. 29, 1989; 73 FR 76287, Dec. 16, 2008; 74 FR 20423, May 4, 2009; 80 FR 26844, May 11, 2015]

EFFECTIVE DATE NOTE: At 84 FR 45016, Aug. 27, 2019, § 402.14 was amended by:

a. Revising paragraph (c);

b. Removing the undesignated paragraph following paragraph (c);

c. Revising paragraphs (g)(2), (4), and (8) and (h);

d. Redesignating paragraph (l) as paragraph (m); and

e. Adding a new paragraph (l), effective Sept. 26, 2019.

At 84 FR 50333, Sept. 25, 2019, this rule was delayed until Oct. 28, 2019.

For the convenience of the user, the added and revised text is set forth as follows:

§ 402.14 Formal consultation.

* * * * *

(c) *Initiation of formal consultation.* (1) A written request to initiate formal consultation shall be submitted to the Director and shall include:

(i) A description of the proposed action, including any measures intended to avoid, minimize, or offset effects of the action. Consistent with the nature and scope of the proposed action, the description shall provide sufficient detail to assess the effects of the action on listed species and critical habitat, including:

(A) The purpose of the action;

(B) The duration and timing of the action;

(C) The location of the action;

(D) The specific components of the action and how they will be carried out;

(E) Maps, drawings, blueprints, or similar schematics of the action; and

(F) Any other available information related to the nature and scope of the proposed

action relevant to its effects on listed species or designated critical habitat.

(ii) A map or description of all areas to be affected directly or indirectly by the Federal action, and not merely the immediate area involved in the action (*i.e.*, the action area as defined at § 402.02).

(iii) Information obtained by or in the possession of the Federal agency and any applicant on the listed species and designated critical habitat in the action area (as required by paragraph (c)(1)(ii) of this section), including available information such as the presence, abundance, density, or periodic occurrence of listed species and the condition and location of the species' habitat, including any critical habitat.

(iv) A description of the effects of the action and an analysis of any cumulative effects.

(v) A summary of any relevant information provided by the applicant, if available.

(vi) Any other relevant available information on the effects of the proposed action on listed species or designated critical habitat, including any relevant reports such as environmental impact statements and environmental assessments.

(2) A Federal agency may submit existing documents prepared for the proposed action such as NEPA analyses or other reports in substitution for the initiation package outlined in this paragraph (c). However, any such substitution shall be accompanied by a written summary specifying the location of the information that satisfies the elements above in the submitted document(s).

(3) Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12.

(4) Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area, a programmatic consultation, or a segment of a comprehensive plan. The provision in this paragraph (c)(4) does not relieve the Federal agency of the requirements for considering the effects of the action or actions as a whole.

* * * * *

(g) * * *

(2) Evaluate the current status and environmental baseline of the listed species or critical habitat.

* * * * *

(4) Add the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat, formulate the Service's opinion as to whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

* * * * *

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions as proposed or taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation. Measures included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize, or offset the effects of an action are considered like other portions of the action and do not require any additional demonstration of binding plans.

(h) *Biological opinions.* (1) The biological opinion shall include:

(i) A summary of the information on which the opinion is based;

(ii) A detailed discussion of the environmental baseline of the listed species and critical habitat;

(iii) A detailed discussion of the effects of the action on listed species or critical habitat; and

(iv) The Service's opinion on whether the action is:

(A) Likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a ''jeopardy'' biological opinion); or

(B) Not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a ''no jeopardy'' biological opinion).

(2) A ''jeopardy'' biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, the Service will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(3) The Service may adopt all or part of:

(i) A Federal agency's initiation package; or

(ii) The Service's analysis required to issue a permit under section 10(a) of the Act in its biological opinion.

(4) A Federal agency and the Service may agree to follow an optional collaborative process that would further the ability of the Service to adopt the information and analysis provided by the Federal agency during consultation in the development of the Service's biological opinion to improve efficiency in the consultation process and reduce duplicative efforts. The Federal agency and the Service shall consider the nature, size, and scope of the action or its anticipated effects on listed species or critical habitat, and other relevant factors to determine whether

an action or a class of actions is appropriate for this process. The Federal agency and the Service may develop coordination procedures that would facilitate adoption of the initiation package with any necessary supplementary analyses and incidental take statement to be added by the Service, if appropriate, as the Service's biological opinion in fulfillment of section 7(b) of the Act.

* * * * *

(l) *Expedited consultations.* Expedited consultation is an optional formal consultation process that a Federal agency and the Service may enter into upon mutual agreement. To determine whether an action or a class of actions is appropriate for this type of consultation, the Federal agency and the Service shall consider the nature, size, and scope of the action or its anticipated effects on listed species or critical habitat and other relevant factors. Conservation actions whose primary purpose is to have beneficial effects on listed species will likely be considered appropriate for expedited consultation.

(1) *Expedited timelines.* Upon agreement to use this expedited consultation process, the Federal agency and the Service shall establish the expedited timelines for the completion of this consultation process.

(2) *Federal agency responsibilities.* To request initiation of expedited consultation, the Federal agency shall provide all the information required to initiate consultation under paragraph (c) of this section. To maximize efficiency and ensure that it develops the appropriate level of information, the Federal agency is encouraged to develop its initiation package in coordination with the Service.

(3) *Service responsibilities.* In addition to the Service's responsibilities under the provisions of this section, the Service will:

(i) Provide relevant species information to the Federal agency and guidance to assist the Federal agency in completing its effects analysis in the initiation package; and

(ii) Conclude the consultation and issue a biological opinion within the agreed-upon timeframes.

* * * * *

§ 402.15 Responsibilities of Federal agency following issuance of a biological opinion.

(a) Following the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion.

(b) If a jeopardy biological opinion is issued, the Federal agency shall notify the Service of its final decision on the action.

(c) If the Federal agency determines that it cannot comply with the requirements of section 7(a)(2) after consultation with the Service, it may apply for an exemption. Procedures for exemption applications by Federal agencies and others are found in 50 CFR part 451.

§ 402.16 Reinitiation of formal consultation.

Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

(a) If the amount or extent of taking specified in the incidental take statement is exceeded;

(b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;

(c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or

(d) If a new species is listed or critical habitat designated that may be affected by the identified action.

EFFECTIVE DATE NOTE: At 84 FR 45017, Aug. 27, 2019, § 402.16 was amended by:

a. Revising the section heading;

b. Redesignating paragraphs (a) through (d) as paragraphs (a)(1) through (4);

c. Designating the introductory text as paragraph (a);

d. Revising the newly designated paragraphs (a) introductory text and (a)(3); and

e. Adding a new paragraph (b), effective Sept. 26, 2019.

At 84 FR 50333, Sept. 25, 2019, this rule was delayed until Oct. 28, 2019.

For the convenience of the user, the added and revised text is set forth as follows:

§ 402.16 Reinitiation of consultation.

(a) Reinitiation of consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

* * * * *

Shafer & Freeman Lakes Environmental Conservation Corporation, et al. v. FERC **Docket No. P-12514**
D.C. Cir. No. 19-1066

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 24th day of June, 2020, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

/s/ Elizabeth E. Rylander
Elizabeth E. Rylander

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Chronology of Events and Agency Decisions

1923	Norway Dam goes into service.
1925	Oakdale Dam goes into service.
1944	Licensee purchases both dams.
1994	Licensee sells land surrounding and under both lakes to Shafer & Freeman Lakes Environmental Conservation Corporation.
2007	FERC licenses the Norway-Oakdale Hydroelectric Project: *N. Ind. Pub. Serv. Co.*, 121 FERC ¶ 62,009 (2007), JA 92.
2012	Severe drought; Service and Indiana observe mussel mortality downstream of dams.
July 1, 2012	Service requires minimum release of 200 cubic feet per second from Oakdale Dam so that Licensee may avoid take of mussels.
July 14, 2012	Lake Freeman falls 1.08 inches below required level for 37 hours.
Summer 2013	Drought continues; additional mussel deaths.
Dec. 13, 2013	Service requires minimum river flow of 500 cubic feet per second at Delphi Gage.
Aug. 1, 2014	Lake Freeman falls 15 inches below required level.
Aug. 13, 2014	Service delivers Technical Assistance Letter.
Oct. 2, 2014	Licensee files license amendment application to update the definition of "abnormal river conditions." (R.2)

Feb. 12, 2015	FERC issues notice of the license amendment application. (R.75)
Mar. 18, 2015	Indiana files comments supporting lowering of either or both reservoirs to protect mussels and habitat. (R. 222)
Apr. 14, 2015	Service files comments supporting the revised definition of "abnormal river conditions." (R.327)
May 15, 2015	Coalition files protest to license amendment application (R.415), along with evidentiary appendix (R.416) and hydrologist reports (R.417 to R.418).
Oct. 9, 2015	FERC staff releases draft Environmental Assessment. (R.466)
Oct. 16, 2015	FERC staff seeks Service's concurrence with staff modifications to revised definition of abnormal river conditions. (R.468)
Nov. 6, 2015	Comments on draft Environmental Assessment and staff modifications from Corporation (R.476), Licensee (R.475), Indiana (R.474), and the Service (R.473).
Nov. 16, 2015	Service files additional comments on draft Environmental Assessment. (R.478)
May 10, 2016	FERC staff holds technical conference.
Oct. 17, 2016	Service files supplemental comments. (R.574)
Nov. 10, 2016	FERC staff releases Final Environmental Assessment (R.582) and requests Service's concurrence with Staff Alternative (R.583).

Dec. 9, 2016	Service notifies FERC staff that it does not concur with the Staff Alternative. (R.586, supplemented on Dec. 13, 2016 in R.589)
Feb. 16, 2017	FERC staff provides additional information to Service, and requests formal consultation if Service still doesn't concur. (R.615)
Feb. 27, 2017	Service initiates formal consultation. (R.618)
July 6, 2017	Service issues Biological Opinion. (R.630 to R.637)
Oct. 3, 2017	Licensee (R.639) and Coalition (R.647) file comments on Biological Opinion.
Dec. 13, 2017	Service responds to Coalition comments. (R.661)
June 21, 2018	FERC issues Initial Order. (R.692)
July 19, 2018	Coalition requests rehearing. (R.695)
Jan. 17, 2018	FERC issues Rehearing Order. (R.718)